(16,121.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 391.

THE NORTHERN PACIFIC RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

PATRICK R. SMITH.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 10, 1897.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1895, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday, to wit, the sixth day, of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the eighth day of November, A. D. 1894, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of North Dakota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of The Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith; which said transcript of record, as printed by the stipulation of the parties for the use of said court of appeals on the hearing of said case, is in the words and figures following, to wit:

2 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error.

In error to the circuit court of the United States for the district of North Dakota.

In the above-entitled case it is hereby stipulated that the following exhibits may be omitted from the printed transcript of record, and that either party may refer to and use upon the argument the exhibits contained in the original transcript, to wit:

Exhibit "A," plat of Government township survey.

Exhibit "B," map purporting to be a copy of a portion of map of definite location east of the Missouri river, a distance of twenty-four miles, and to a point west of said river, a distance of about six miles.

Exhibit "C," map purporting to be a diagram showing the general route and definite location through townships in ranges 77, 78, 79, 80 and 81 west, in North Dakota, where said road crossed the Missouri.

Exhibit "1," map fixing definite location of line.

Exhibit "2," report of commissioners appointed to examine road with so much of map, Exhibit "C" referred to therein, as may affect the property involved.

Dated at St. Paul, Sept. 14th, 1894.

F. M. DUDLEY & J. H. MITCHELL, JR.,
Attorneys for Plaintiff in Error.
STEVENS, O'BRIEN & GLENN,
Attorneys for Defendant in Error.

U. S. — court of appeals, 8th circuit. No. 556. Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith, defendant in error. Stipulation to omit certain exhibits from the printed record. Filed Nov. 8, 1894. John D. Jordan, clerk.

3 Pleas before the Hon. Alfred D. Thomas, judge of the district court of the United States in and for the district of North Dakota, sitting in the circuit court of the United States for the eighth circuit and said district of North Dakota, at the term of April, A. D. 1893.

PATRICK R. SMITH, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Be it remembered that on the 28th day of December, 1891, a bill of complaint was filed in the office of the clerk of said circuit court in the above-entitled cause, which said bill of complaint is in words and figures following, to wit:

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The complaint of the above-named plaintiff respectfully shows to this court and alleges that the plaintiff is and ever since the organization of the State of North Dakota has been a citizen thereof, and that prior thereto he was during all the time hereinafter mentioned a citizen of the Territory of Dakota.

That during all the time hereinafter mentioned the above-named defendant has been and still is a corporation created by and existing under and in virtue of an act of the Congress of the United States of America, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, by the Northern route." Approved July 2nd, 1894.

That on the fourteenth day of September, A. D. 1876, the plaintiff became and ever since has been and still is duly seized in fee-simple and entitled to the possession of the following-described real property situated in the city of Bismarck, in the county of Burleigh and Territory of Dakota (now and since the organization thereof under a State government, the State of North Dakota), to wit:

Lots numbered five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12), in block number eight (8) according to the recorded plat of the city of Bismarck, D. T., together with the hereditaments, privileges and appurtenances thereof and thereto belonging.

3½ That said defendant more than six years prior to the commencement of this action, wrongfully and unlawfully went into possession of the premises above described.

That said defendant ever since said entry has wrongfully and unlawfully retained and withheld and still does wrongfully and unlawfully retain and withhold the possession thereof from the plaintiff. And that the use and occupation thereof during said time was worth at least five thousand ($5,000) dollars a year.

That the damage to the plaintiff by the wrongful withholding of the possession of the premises as aforesaid is the sum of (thirdty) thousand ($30,000) dollars.

Wherefore, the plaintiff demands judgment against said defendant for the possession of said premises and for the sum of thirty thousand ($30,000) dollars, his damages as aforesaid together with his costs and disbursements herein.

F. H. REGISTER,
Attorney for Plaintiff.
STEVENS, O'BRIEN & GLENN,
Counsel for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Patrick R. Smith, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing pleading and that the same is true of his own knowledge, except as to those things which are therein stated upon his information and belief and as to those things he believes it to be true.

(Signed) PATRICK R. SMITH.

Subscribed and sworn to before me this 27th day of Nov., 1891.

[SEAL.] EDWIN F. GLENN,
Notary Public, Ramsey County, Minnesota.

Upon the back of said bill of complaint appear indorsements in words and figures following, to wit:

Original. In the circuit court of the United States for the district of North Dakota. Patrick R. Smith against The Northern Pacific Railroad Company. (Complain-.) Filed December 28th, 1891. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy. Stevens, O'Brien & Glenn, counsel for pl't'ff.

Thereupon afterwards, to wit, on the 28th day of December, 1891, a summons was issued in said case, which said summons is in words and figures following, to wit:

4 *Summons.*

UNITED STATES OF AMERICA,
District of North Dakota, Southwestern Division, } *ss:*

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH
against
THE NORTHERN PACIFIC RAILROAD COMPANY.

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Bismarck, county of Burleigh and State of North Dakota, and file your answer in said clerk's office within thirty days after the service hereof, excluding the day (os) such service, and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded and for the costs and disbursements of this action. For the marshal of the district of North Dakota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 28th day of December, A. D. 1891. Issued at my office in the city of Bismarck, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] J. A. MONTGOMERY, *Clerk*,
By EDW'D S. ALLEN, *Deputy.*

F. H. REGISTER,
Plaintiff's Attorney.

Upon the back of said summons appear indorsements in words and figures following, to wit:

United States circuit court, district of North Dakota, southwestern division. No. —. Patrick R. Smith, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant. Summons. (Original.) Returned and filed Dec. 28, 1891. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy. F. H. Register, plaintiff's attorney.

DISTRICT OF DAKOTA, *ss:*

I hereby certify and return that on the 28th day of December, 1891, I received the within summons, and on the same day I served the same upon the within-named the Northern Pacific Railroad
5 Company by John D. Davidson, the general agent for said company in the city of Bismarck, Burleigh county, N. D., by delivering to and leaving with him a true copy thereof, with all the indorsements thereon.

A. F. PRICE, *U. S. Marshal*,
By MURDOCK McKENZIE,
Deputy U. S. Marshal.

Marshal's fees, $2.00.

Thereupon afterwards, to wit, on the 5th day of April, 1892, an amended answer was filed in said case, which said amended answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH, Plaintiff,
vs.
NORTHERN PACIFIC R. R. Co., Defendant.

The defendant for amended answer to the complaint herein:

First. For a first defense—

Alleges that the land mentioned in the complaint is situated within 200 feet of the center line of the road-bed of it- line of railroad constructed through the State of North Dakota, and has been for more than 20 years in its lawful possession as its right of way, road-bed and depot grounds, and that the same was granted to it as a right of way by the act of Congress described in the complaint.

Admits that at all the times mentioned in the complaint the plaintiff was a resident of the city of Bismarck, in the State of North Dakota, and further admits that the defendant is a corporation created by the said act of Congress.

Denies each and every allegation in the complaint not hereinbefore specifically admitted, and it specific-ly denies that by reason of any of the allegations or things in the said complaint set forth the plaintiff has been damaged in any sum whatever.

Second. For a second defense—

That on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the 6th judicial district for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action.

That at the time of the commencement of this action, said action was pending in said court and is still pending therein.

6 Third. For a third defense—

That on the 31" day of Jan., 1878, the defendant recovered judgment against the plaintiff for the possession of a portion of the property described in the complaint, to wit: that portion thereof described as lots 11 and 12, for $.06 damages and for $— costs, and that said judgment was rendered upon the cause of action mentioned in the complaint, which judgment is in full force, unreversed and unsatisfied.

Wherefore, the defendant demands judgment:

1. That the complaint be dismissed.
2. For its costs and disbursements in this action.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Alexander Hughes, being first duly sworn, deposes and says he is attorney for the defendant in the above-entitled action; that he

has read the foregoing answer and knows the contents thereof, and that the same is true to his best knowledge, information and belief, and deponent further says the reason why the said answer is verified by the deponent and not by the defendant, is that the defendant is a corporation and all of its officers are absent from the county of Burleigh, wherein deponent resides.

ALEXANDER HUGHES.

Subscribed and sworn to before me this 4 day of April, 1892.

[L. S.] M. P. SKEELS,
Notary Public, Burleigh Co., No. Dak.

Upon the back of said amended answer appear indorsements in words and figures following, to wit:

Original. Circuit court of the United States, district of North Dakota. Patrick R. Smith, plaintiff, *vs.* Northern Pacific R. R. Co., defendant. Defendant's amended answer. Due and personal service of the within admitted by copy this 4 day of April, 1892. F. H. Register, attorney for plaintiff. Filed Ap'l 5, 1892. J. A. Montgomery, clerk. Alexander Hughes, attorney for defendant, Bismarck, N. D.

Thereupon afterwards, to wit, on the 5" day of April, 1892, a reply was filed in said case, which said reply is in words and figures following, to wit:

7 *Reply.*

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Def't.

Said plaintiff, for reply to the amended answer of said defendant, admits that on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh in the 6th judicial district for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action; but alleges and avers that said action in said district court has been duly dismissed without prejudice to the plaintiff or to his ri-ht to maintain another action in any court whatsoever; and that there is now no other action pending in any court between the parties to this action, involving the issues or cause of action involved in this action or any (*or any*) part of the same. He denies that the land mentioned in the complaint has been for more than twenty years, or for any other or greater or less period, or for any period whatsoever in the lawful possession of the defendant, as its right of way, road-bed and depot grounds, or for any other purpose, or in any other manner whatsoever, but he admits and avers that the southerly half of said premises has been

unlawfully used and possessed by said defendant partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same for purposes connected with shipment and receipt of freight to and from the railroad of said defendant, for a period of eighteen years last past, and that the northerly half of said premises has been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same, and that such occupation has not been for any of the purposes or uses mentioned in said answer.

He denies that said land or any part thereof has been in the possession of said defendant for twenty years, whether as stated in said answer or otherwise.

He denies that said defendant recovered judgment against the plaintiff on the 31" day of January, 1878, as stated in said answer, or at any other time or in any other manner whatsoever, and he denies that there is any such judgment as therein stated, or any judgment against him in favor of said defendant, in full force, unreversed and unsatisfied, or otherwise.

8 Wherefore, said plaintiff again demands judgment as prayed for in his complaint, notwithstanding anything in said answer contained.

F. H. REGISTER,
Attorney for Plaintiff, Bismarck, N. D.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Patrick R. Smith, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated u-on his information and belief, and that as to those matters, he believes it to be true.

PATRICK R. SMITH,

Subscribed and sworn to before me this 4th day of April, 1892.
[L. S.] M. P. SKEELS,
Notary Public, Burleigh County, North Dakota.

On the back of said reply appear indorsements in words and figures following, to wit:

In the circuit court of the United States for the district of North Dakota. Patrick R. Smith, pl't'ff, *vs.* The Northern Pacific R. R. Co., def't. Reply. Due service at Bismarck, N. D., this 4th day of April, A. D. 1892, of the within reply is hereby admitted. Alexander Hughes, att'y for def't. Filed Ap'l 5, 1892. J. A. Montgomery, clerk. F. H. Register, att'y for pl't'ff.

Thereupon afterwards, to wit, on the 16" day of March, A. D. 1894, an agreed statement of facts was filed in said case, which said agreed statement of facts is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of North Dakota.

United States Circuit Court, Southwestern Division.

PATRICK R. SMITH, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

In the above-entitled action it is hereby stipulated that the following are the facts upon which the judgment of the court shall be rendered, and that a trial by a jury be and is hereby waived.

9 The property in controversy is eight lots in the city of Bismarck, in North Dakota, described as lots five (5) to twelve (12), inclusive, in block eight (8), which were a part of an eighty-acre tract of land that was entered by John A. McLean as mayor of that city, in behalf of its inhabitants, under the town-site act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21, 1879. The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff. The eighty-acre tract on which these lots are situated was selected as the location for a portion of this town site and surveyed prior to June 20th, 1872. In the year 1872, the attorney of the Lake Superior and Puget Sound Land Company—the company that first made this selection—commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

The congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873, a copy of which is hereto attached and marked Exhibit "A."

On February 21st, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line, a copy whereof is hereto attached and marked Exhibit "1." The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that

part of the public domain embracing the premises in question. Exhibits "B" and "C," hereinafter described, are copies of said record maps.

The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872, grading was done by the
10 company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872, there was a line staked out across the tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the month of June, 1873, the railroad was constructed across this tract, and has since remained and been operated u-on it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed, and about two miles from its line of definite location as shown on its map filed to definitely (fic) this line, and have been occupied by the defendant and its tenants during the period in question, but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

It is further stipulated, subject to plaintiff's objection and exception as to materiality, competency and relevancy of the evidence, that, after the road was constructed, commissioners were duly appointed by the President, under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873; a copy of which report, and so much of the map accompanying the same and therein referred to as Exhibit "C," as may affect this controversy, and of the letter of the Secretary of the Interior transmitting the report to the President, and of the President's approval indorsed thereon, so far as it affects the premises in question, is hereto attached and marked Exhibit "2."

It is further stipulated that there shall be admitted and considered in evidence, subject to defendant's objection and exception thereto on the ground that the (s-me) are not the best evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office, two maps, the one certified by S. M. Stockslager, Commissioner of the General Land Office, under date of April 27th, 1889, purporting to be "copy of portion of the map of definite location of the Northern Pacific Railroad Company east of the Missouri river a distance of 24 miles and to a point west of said river a distance of about 6 miles," which is hereto attached and marked Exhibit "B;" and the other certified by Thomas H. Carter, Commissioner of the General Land Office, under date of March 17th, 1892, purporting to be "copy of a
11 diagram showing the general route, the map of which was

accepted by the Secretary of the Interior, February 21st, 1872, and the definite location of the Northern Pacific Railroad Company through townships in ranges 77, 78, 79, 80 and 81 west, in North Dakota, where said road crosses the Missouri river," which is hereto attached and marked Exhibit " C."

It is further stipulated that the testimony of one Charles A. F. Morris, given in the case of The St. Paul and Pacific Railroad Company *et al. versus* Northern Pacific Railroad Company, as contained in the printed transcript of the record of cause number 344 on the docket of the Supreme Court of the United States, October term, 1889, a copy whereof is hereto attached, marked Exhibit "—," shall be considered as a part of the evidence in this case, subject to the objection and exception of the plaintiff as to the materiality, competency and relevancy thereof.

It is further stipulated, subject to plaintiff's objection and exception as to the competency, materiality and relevancy thereof, that a certain action was heretofore commenced and (prosecuted) in the district court of the third judicial district within and for the Territory of Dakota, in the county of Burleigh, in favor of the Northern Pacific Railroad Company against James Browning and others, including the plaintiff herein, defendants; and that Exhibits 4, 5, 6, 7 and 8 hereto attached are true copies of the record of said proceedings.

It is further stipulated that the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of this action, is the sum of twenty-six thousand dollars ($26,000.00); and that the value of the use and occupation of said premises, omitting that part thereof purporting to be affected by the proceedings set out in Exhibits 4, 5, 6, 7 and 8, is the sum of twenty-one thousand dollars ($21,000.00).

It is further stipulated that the testimony of Montgomery Meigs, a witness produced by the defendant, a copy whereof is here attached and marked Exhibit " 9," shall be considered as part of the evidence in this case subject to the objection and exception of the plaintiff as to the materiality, competency and relevancy thereof.

It is further stipulated that upon the facts and evidence hereinabove stipulated, and subject to the terms of this stipulation,
12 judgment shall be entered as of the adjourned April, 1893, term of said court.

F. H. REGISTER,
Pl'ff's Attorney.
H. F. STEVENS, *Of Counsel.*
ALEXANDER HUGHES,
Def't's Attorney.
F. M. DUDLEY AND
J. H. MITCHELL, JR.,
Of Counsel.

Attached to said agreed statement of facts are exhibits numbered 4, 5, 6, 7 and 8, which said exhibits are in words and figures following, to wit:

EXHIBIT 4.

TERRITORY OF DAKOTA, } ss:
County of Burleigh, }

In District Court, 3d Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl't'ff,
vs.
JAMES BROWNING and JOHN WR-NGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith, Def't-.

The Territory of Dakota to Browning & Wringrose and P. R. Smith, the above-named defendants:

You and each of you are summoned and required to answer the complaint in this action, which is filed in the office of the clerk of the district court in and for the county of Burleigh, D. T., and to serve a copy of your answer upon the subscriber at his office in the city of Bismarck within thirty days, exclusive of the day of service. If you fail to answer the complaint within that time, plaintiff will apply to the court for the relief demanded in the complaint.

Dated Aug. 31, 1877.

GEO. P. FLANNERY,
Att'y for Pl't'ff.

Upon the back of said Exhibit 4 appear indorsements in words and figures following, to wit:

TERRITORY OF DAKOTA, } ss:
County of Burleigh, }

I hereby certify and return that at Bismarck, in said county, I did serve the within summons upon P. R. Smith by handing to and leaving with him a true and correct copy thereof, and
13 further, after diligent search that I was unable to find the said Browning and Wringrose, or either of them within my county, and that I served the within summons upon the said Browning & Wringrose, and a person of proper age and discretion.

Dated this 3rd day of September, 1877.

ALEXANDER McKENZIE, *Sheriff.*

Service	$1 20	
Copy	50	
Travel	20	
		$1 90

District court, Burleigh county. Northern Pacific Railroad Company *vs.* Browning & Wringrose and P. R. Smith. Summons. G. P. Flannery' att'y for pl'ff.

EXHIBIT 5.

Complaint.

TERRITORY OF DAKOTA, }
County of Burleigh. }

In District Court, 3rd Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,
vs.
JAMES BROWNING & JOHN WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith, Def'ts.

The complaint of the plaintiffs above named respectfully shows to this court and alleges, that the Northern Pacific Railroad Company is a corporation created by and exists under an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route, approved July 2", 1864. That James Browning and John Wringrose are and have been for three years last copartners doing business under the firm name of Browning & Wringrose. That in May, 1873, plaintiff became seized in fee for the use and purpose of a right of way to the following-described real estate, viz:

That certain tract of land two hundred feet in width and three hundred feet in length, lying between Third and Fourth streets and north and along the railroad track in the city of Bismarck.

14 That Browning & Wringrose, one of the defendants above named, on or about the 1st day of October, 1874, wrongfully and unlawfully went -to possession of that part of said tract of land described as follows, to wit:

Commencing at the corner of Main and Third streets, in the city of Bismarck, and running south along the east line of Third street seventy-five feet, thence east fifty feet, thence north to the south line of Main street, thence west on the south line of Main street to the place of beginning.

That on or about the 1st day of November, 1876, the said Browning & Wringrose rented said premises to P. R. Smith, who is now in the possession thereof.

That defendant wrongfully and unlawfully withholds the possession thereof from pl't'ff.

Wherefore the plaintiffs demands judgment for the possession of said premises, and for (fice) hundred dollars the plaintiff's damages by withholding of the same and costs.

GEO. P. FLANNERY,
Att'y for Pl'ff.

COUNTY OF BURLEIGH, *ss:*

Geo. P. Flannery came before me personally and being first duly sworn deposes and says he is att'y for pl'ffs above named; that he

has read the foregoing complaint and knows the contents thereof and that he believes it to be true; that all the material allegations are within his personal knowledge; that the reason why this verification is not made by plaintiff is that all the officers thereof are absent from the county of Burleigh, where resides this affiant.

GEO. P. FLANNERY.

Subscribed and sworn to before me this 1st day of Sept., 1877.

E. N. COREY,
Clerk of Dist. Court.

On the back of said exhibit appear indorsements in words and figures following, to wit:

District court, 3rd judicial district. Northern Pacific Railroad Company *vs.* Browning & Wringrose & P. R. Smith. Complaint. Filed Sept. 1, 1877. E. N. Corey, clerk. Geo. P. Flannery, att'y for pl'ff.

15 EXHIBIT 6.

Demurrer.

TERRITORY OF DAKOTA, } ss:
County of Burleigh, }

In District Court, 3rd Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,
vs.
JAMES BROWNING and JAMES WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose.

And now comes the above-named defendant P. R. Smith by his attorney David Stewart and demurs to the complaint of the plaintiff for the following reasons, to wit: That it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action, in that it does not appear that the plaintiff is entitled to the possession of the premises described in the complaint.

Dated at Bismarck this 17" day of November, 1877.

DAVID STEWART,
Att'y for P. R. Smith, Def't.

To Geo. P. Flannery, att'y for pl'ff.

On the back of said exhibit appear indorsements in words and figures following, to wit:

District court, 3rd judicial district. Northern Pacific Railroad Co. *vs.* Browning & Wringrose and P. R. Smith. Demurrer of P. R. Smith. David Stewart, att'y for def't.

EXHIBIT 7.

TERRITORY OF DAKOTA, }
County of Burleigh. }

District Court, 3rd Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
JAMES BROWNING and JOHN WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith.

Take notice that on the summons, complaint and demurrer, sheriff's return and affidavit of Geo. P. Flannery, a motion will be made before the Hon. A. H. Barnes, judge of the district court
16 of Burleigh Co. aforesaid, at chambers in the city of Bismarck, on the 31" day of January, 1878, at 2 o'clock p. m. of that day for judgment in favor of plaintiff, on the demurrer herein as frivolous and for such other and further relief as may (—) just and equitable and costs.

Dated Jan. 30", 1878.

GEO. P. FLANNERY,
Att'y for Pl'ff.

To David Stewart, Esq., att'y for def't.

EXHIBIT 8.

TERRITORY OF DAKOTA, }
County of Burleigh, } *ss:*

In District Court, Third Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
JAMES BROWNING and JOHN WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith.

The above-entitled cause having been brought before the Honorable A. H. Barnes, judge of the 3rd judicial district aforesaid, at the city of Bismarck, in said county of Burleigh, on the 31st day of January, 1878—

On motion for judgment in favor of plaintiff on frivolous demurrer—

On reading and filing the notice of motion, the affidavit of Geo. P. Flannery, of no answer, demurrer or notice of appearance by Browning and Wringrose, and upon the summons and all the pleadings and proceedings in the case.

After hearing Geo. P. Flanner-, in favor of said motion, and David Stewart in opposition thereto, it is ordered, decreed and adjudged, that the plaintiff have judgment herein on the demurrer as frivo-

lous, and that plaintiff recover possession of the real estate described as follows: That certain tract of land situated in the city of Bismarck, county of Burleigh, aforesaid, viz:

Commencing at the corner of Main and Third streets in the city of Bismarck, and running south along the east line of Third street seventy-five feet, thence east fifty feet, thence north to the south line of Main street, thence west on the south line of Main street to the place of beginning; and also six cents damages for the withholding possession thereof.

17 And also ten dollars ($10.00) costs on motion and five dollars ($5.00) costs of court, being the amount stipulated between the respective attorneys for the plaintiff and defendant.

Dated January 31st, 1878.

By the court:

A. H. BARNES, *Judge.*

Thereupon afterwards, to wit, on the 16" day of March, 1894, findings of fact were filed in said case, which said findings of fact were in words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of North Dakota. }

United States Circuit Court, Southwestern Division.

PATRICK R. SMITH, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

The above-entitled action having come on for trial by and before the court, at the adjourned April, 1893, term thereof, held at Bismarck in said district on the first Tuesday of March, A. D. 1894, upon an agreed statement of facts filed in said action, a jury having been duly waived; Messrs. F. H. Register and H. F. Stevens appearing as attorneys for plaintiff, and Messrs. F. M. Dudley and J. H. Mitchell, Jr., appearing as attorneys for defendant.

Now, after hearing the parties and a consideration of the matters set forth in the pleading and evidence, I find the facts to be as follows:

The property in controversy, the same being eight lots in the city of Bismarck in North Dakota, described as lots five (5) to twelve (12) both inclusive, in block eight (8), in the city of Bismarck, which was formerly known as Edwinton, and the name of which was changed by act of the legislature of the Territory of North Dakota to "Bismarck," was part of an eighty (80) acre tract of land which was entered by John A. McLean as mayor of the city of Bismarck, in behalf of its inhabitants, under the town-site act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21st, 1879.

The corporate authorities of that city subsequently and more than six years prior to the commencement of the action, conveyed these lots to Patrick R. Smith, the plaintiff.

18 The eighty (80) acre tract on which these lots were situated, was selected as the location of a portion of this town site, and surveyed prior to June 20th, 1872. In the year 1872 the attorney of the Lake Superior and Puget Sound Land Company—the company that first made this selection—commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9th, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

The congressional town site embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

On February 21st, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line. The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872 there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873 the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line
19 of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant, through its tenants, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

In the year 1877 the defendant commenced an action in the district court of Burleigh county, Territory of Dakota (now State of

North Dakota), in which county the premises next hereinafter described were and are situated against certain parties including the plaintiff herein, to recover the possession or part of the premises here in question, which portion is particularly described as follows: Commencing at the southeast corner of Main and Third streets in the city of Bismarck, the same being the northwest corner of block eight (8), running thence east along the south line of said Main street, a distance of fifty (50) feet; thence south, parallel with the east line of said Third street, a distance of seventy-five (75) feet to said east line of said Main street a distance of fifty (50) feet, to said Third street; thence north, along said east line of said Third street, a distance of seventy-five (75) feet to the place of beginning. And such proceedings were duly had in said action in said court (the same being a court of competent jurisdiction of the parties and subject-matter of said action), that the defendant in the action herein (the plaintiff in the action last above referred to) duly recovered in said action a judgment against the defendants in that action including the plaintiff in this action, for the possession of the premises last above described and for nominal damages for the withholding thereof.

That the value of the use and occupation of the premises in question, for six years prior to December 28", 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars.

From the foregoing facts I find as conclusions of law, that the plaintiff is entitled to the possession of the premises above described, and to recover from the defendant the sum of twenty-six thousand dollars, with interest thereon from the 28th day of December, A. D. 1891, at the rate of seven per cent. per annum, and his costs and disbursements.

Let judgment be entered accordingly.

ALFRED D. THOMAS.

Dated March 16th, 1894.

20 Attached to said findings of fact *was* the defendant's proposed findings of fact, which said defendant's proposed findings of fact *was* in words and figures following, to wit:

The foregoing having been submitted to counsel for defendant as the findings of fact to be made by the court in this cause, the defendant by its counsel thereupon and before the signing of said findings, the counsel for plaintiff being present, requested the court to make some finding of fact based upon the testimony of — Morris and — of Montgomery Meigs, witnesses on behalf of defendant, as (*tomthe*) line as designated on the map of definite location of a line of railroad as generally filed or as required to be filed under the various congressional railroad land grant acts, not being the line as finally located for the purposes of construction, and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed, and that the term definite location as used in respect to the requirements for making or filing maps, showing the line of location does not include within its meaning final location as required

for purposes of construction, which request for some finding of fact based upon said testimony, was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth the defendant by its counsel excepts, which said exception is allowed. And the defendant then and there requested the court to find as one of the facts in this cause that the line as designated on the map of definite location of a line of railroad as generally made or filed, or as required to be made or filed under the various congressional railroad land grant acts is not the line as finally located for purposes of construction and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed, and that the term definite location as used in respect to the requirements for making or filing maps showing the line of location does not include within its meaning final location as required for the purposes of construction, which request for finding of fact was refused by the court, to which refusal of the court to make said finding, defendant by its counsel excepts, which said exception is allowed. And the defendant further by its counsel requests the court that some finding may be made by the court based upon the testimony of Montgomery Meigs, a witness on behalf of the defendant, as to the necessity for the variation from the line as designated on the map of definite location as filed by the defendant to the line as finally constructed and now in operation over the premises involved in this action, and as to the line as designated upon said map being impracticable for purposes of safe or economical construction
21 which said request for some finding of fact based upon said testimony, was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth the defendant by its counsel excepts, which said exception is allowed. And the defendant then and there requested the court to find as one of the facts in this cause that the line as designated on the map of definite location as filed by defendant was not a line practicable for purposes of safe or economical operation, and that it became necessary in constructing the road of the defendant, on the approval of the same from the east to the Missouri river, and through the township in which the premises in question are situated, to vary from the line as designated on the map of definite location as filed to the line as constructed through the premises in question in order to obtain a line or route practicable for safe and economical operation, which said request for said finding of fact is refused by the court, to which said refusal of the court to make said finding, defendant by its counsel excepts, which said exception is allowed.

Thereupon afterwards, to wit, on the said 16th day of March, A. D. 1894, judgment was filed and entered in said case, which said judgment appears of record on page 73 of the journal of said court, southwestern division, and is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of North Dakota.

United States Circuit Court, Southwestern Division.

PATRICK R. SMITH, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Adjourned April, 1893, term.

The above-entitled action having duly come on for trial at said term, before the court, a jury having been duly waived, and said cause having been duly (tr-ed) and determined by the court, and the court having made and filed its findings of fact and conclusions of law, it is hereby adjudged and determined:

That the plaintiff is, and ever since a period anterior to the 28th day of December, A. D. 1885, has been the owner in fee-simple and entitled to the possession of that certain real property described in the complaint and further known and described as lots five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12), all inclusive, in block eight (8), of the city of Bismarck, (formerly known as Edwinton) according to the plat thereof on
22 file and of record in the office of the register of deeds of the county of Burleigh and State of North Dakota; and that said defendant has wrongfully and unlawfully withheld the possession thereof from said plaintiff for a period of six (6) years prior to the twenty-eighth (28) day of December, A. D. 1891.

It is further adjudged and determined that said plaintiff (i-) entitled to recover from said defendant the sum of thirty thousand twenty-four and 21/100 (doll-rs,) as damages for the withholding of said property, together with the sum of seventy-five and 77/100 dollars, his costs and disbursements.

ALFRED D. THOMAS, *Judge.*

Upon the back of said judgment appear endorsements in words and figures following, to wit:

Patrick R. Smith *vs.* N. P. R. R. Co. Judgment. Filed March 16th, 1894. J. A. Montgomery, clerk, by R. D. Hoskins, deputy.

Thereupon afterwards, to wit, on the said 16th day of March, A. D. 1894, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of North Dakota. }

Bill of Exceptions.

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff, }
vs. }
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

This cause, which was an action of ejectment, for the recovery of certain real estate described as lots five (5) to twelve (12), inclusive, in block eight (8), in the city of Bismarck, North Dakota, and for damages for the withholding of the possession thereof for six years prior to the commencement of the action, came on for trial by and before the court on the sixteenth day of March, 1894, at the adjourned April, 1893, term thereof, convened at Bismarck, in said district, on the first day of March, A. D. 1894.

Said trial being commenced and proceedings before the judge of said court without a jury, it having been stipulated by stipulation in writing filed in this cause, by the parties thereto, that the case should be tried without a jury, and, thereupon, Messrs. F. H.
23 Register and H. F. Stevens appearing for the plaintiff, and F. M. Dudley and J. H. Mitchell, Jr., appearing in behalf of the defendant, it was agreed between the parties in interest by stipulation in writing, placed upon file, that the facts in this case, in addition to those facts established by the pleadings, are as follows:

That the property in controversy is eight (8) lots in the city of Bismarck, North Dakota, described as lots five (5) to twelve (12), inclusive, in block eight (8), which were a part of an eighty (80) acre tract of land that was entered by John A. McLean, as mayor of the city, in behalf of its inhabitants, under the town-site act (Revised Statutes, section twenty-three eighty-seven—2387), and was patented to him thereunder (Jult) twenty-first (21), 1879.

The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff.

The eighty (80) acre tract on which these lots are situated was selected as the location for a portion of this town site and surveyed prior to June twentieth, 1872.

In the year 1872, the attorney of the Lake Superior and Puget Sound Land Company—the company that first made this selection—commenced, and thereafter continued, to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February ninth, 1874, recorded in the office of the register of deeds of the county in which the land was situated.

By the first of January, 1873, thirty (30) buildings had been erected on the town site and from that time until the patent was issued the population of the city and the improvements in it continued to increase.

It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

The congressional town site embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873, a copy of which marked Exhibit "A," is attached to the stipulation hereinbefore referred to as having been filed in this case, which said copy as so attached to said stipulation was used as evidence in this case, and is, by this reference thereto, made a part of, and included within this bill of exceptions.

24 On February 21st, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this eighty-acre tract.

On May 26th, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line, a copy whereof marked Exhibit "1," is attached to the stipulation hereinbefore referred to as having been filed in this case; which said copy as so attached to said stipulation was used as evidence upon said trial and is, by this reference thereto, made a part of, and included in this bill of exceptions.

The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to, and remain on file in, the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question.

Exhibits "B" and "C," hereinafter described, are copies of said record maps.

The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872, grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading.

During the year 1872, there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873.

In the month of June, 1873, the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred (200) feet of the main track of this railroad as actually constructed and about two (2) miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant and its tenants during the period in question, but no part of the same, except the rear twenty-five (25) feet thereof, has ever been

occupied for railroad purposes. That the premises in question were public lands of the United States on the second day of July, 1864.

By virtue of the provisions of the stipulation filed as aforesaid, it was agreed between the parties in interest, subject to the
25 plaintiff's objection and exception as to the materiality, competency and relevancy of the evidence, that it was and is a fact that after the road was constructed commissioners were duly appointed by the President under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon. That they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior under date of November 28th, 1873, and was approved by the President under date of December first, 1873, a copy of which report and of so much of the map accompanying the same and therein referred to as Exhibit "C" as may affect the controversy involved in this action, and of the letter of the Secretary of the Interior transmitting the report to the President and of the President's approval indorsed thereon so far as it affects the premises in question, is attached to the stipulation hereinbefore referred to as having been filed in this case; the said copy as so attached, being marked Exhibit "2," which said fact as agreed upon by said stipulation with respect to the examination of said road by the commissioners, the report of their examination and of the approval of the President and said copy of said report and of said map and of the letter of the Secretary of the Interior and approval of the President indorsed thereon, as so attached to said stipulation, were, in accordance with the terms of said stipulation, offered and introduced upon the trial of said cause as evidence on behalf of the defendant. Said copy of said report and of the letter of the Secretary of the Interior transmitting the same to the President and of the President's approval indorsed thereon, as offered to be introduced as aforesaid, was and is in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 25, 1894.

I, S. W. Lamereaux, Commissioner of the General Land Office, do hereby certify that the annexed copies, to wit:

1. Copy of the letter of the Secretary of the Interior, to this office, bearing date December 2, 1873, transmitting map marked "C" of the Northern Pacific railroad, constructed from the Red River of the North to the Missouri river in North Dakota—

2. Copy of the enclosure therein referred to as a copy of the Secretary's letter to the President, dated November 28th, 1873, recommending the acceptance of said constructed road, and the President's approval thereon—

26 3. Copy of section 10 of said map, marked "C," showing the construction of said road from the 180 to the 196.4 miles, are true and literal exemplifications of the originals on file in this office.

In testimony whereof, I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMOREAUX,
Commissioner of General Land Office.

(Copy.)

3 B. S. DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *2nd Dec.*, 1873.

SIR: I transmit herewith for appropriate action, the map of the Dakota division of the Northern Pacific railroad, from the Red River of the North to the Missouri river, 196.4 miles, examined recently by commissioners, and accepted by the President of the United States yesterday, copy of acceptance herewith, & also of dep't letter of 28th ult.

A profile of this portion of the road is traced on the map.

Very respectfully, &c., C. DELANO, *Secretary.*

Hon. Willis Drummond, Com'r G. L. O.

(Copy.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *28th Nov.*, 1873.

SIR: I have the honor to transmit herewith, for your action, the report of Messrs. Steele, Sands and Le Duc, commissioners appointed by your order to examine and report upon a portion of the Northern Pacific railroad.

Under date of 24th instant, these gentlemen reported on said portion (commincing) at Fargo, on the west bank of the Red river in Dakota Territory, and terminating at Bismarck, on the east bank of the Missouri river, 196.4 miles.

The commissioners in their report represent that this portion of road has been (in the main) constructed in a first-class manner, I, therefore, recommend the acce-tance of the same and the
27 issue to the company of patents for lands due on account of the completion thereof.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

The President.

(Copy.)

EXHIBIT "2."

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Feb.* 2, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record and on file in the department, together with its indorsement.

In testimony whereof, I have hereunto subscribed my name and

caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.] W. H. SIMMONS,
Acting Secretary of the Interior.

(Copy.)

Lands and railroads.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 28*th Nov.*, 1873.

SIR: I have the honor to transmit herewith for your action the report of Messrs. Steele, Sands and Le Duc, commissioners appointed by your order to examine and report upon a portion of the Northern Pacific railroad.

Under date of 24th instant, these gentlemen reported on said portion, commencing at Fargo, on the west bank of the Red river, in Dakota Territory, terminating at Bismarck, on the east bank of the Missouri river, 196.4 miles.

The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class
28 manner, I therefore, recommend the acceptance of the same, and the issue to the company of patents for lands due on account of the completion thereof.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

The President.

(Copy.)

Indorsement: Northern Pacific 2nd sec., 196.4 m. Department of the Interior, 28th Nov., 1873. Columbus Delano, Secretary, submits to the President report of commissioners on 196.4 miles of Northern Pac. railroad. Executive Mansion, Dec. 1st, 1873. The within recommendations are approved. Seal. U. S. Grant. Sturges. Copy to G. L. O. 2 Dec., '73. Mr. Case notified same day.

Copy.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Feb.* 2, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals on file in this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.] W. H. SIMMS,
Acting Secretary of the Interior.

(Copy.)

WASHINGTON, D. C., *Nov. 24th*, 1873.

Hon. Columbus Delano, Secretary of the Interior.

SIR: Pursuant to instructions, bearing date October 2nd, 1873, the undersigned, commissioners to examine a completed portion of the Northern Pacific railroad "on its main line between the Red River of the North and the Missouri river" have the honor to submit the following report:

Upon reaching Fargo, at the eastern end of the division which we were directed to examine, we found that owing to the absence of the president of the company, we could not, without great delay, obtain the requisite affidavit of that officer showing "the
29 commencement, termination and length of the road, to be examined" and affirming its completion as required by the Government. We therefore, telegraphed asking for instructions, and were directed to proceed with the examination and secure the required affidavit before making our report. A copy of the instructions is submitted herewith marked "A."

The president's affidavit is also herewith submitted marked "B."

The required map "showing the connection of the line of the road with the line of the public surveys where the latter have been run; also showing the radii and lengths of curves and courses of tangents" with other data as specified in the instructions issued by the Interior Department, bearing date April 28th, 1871, is also transmitted herewith marked "C" and has attached to it the requisite affidavit of the chief engineer, duly attested by the president and secretary of the company.

Location of the road.

After a thorough examination, we find that the line is so located as to serve the purposes both of a central and convenient channel for the trade and travel of the count-y through which it passes, and that proper regard has been paid to future as well as to present needs of local and also of through traffic.

Grades and curves.

The grades of the road as now constructed are shown by the following statement, taken from the map and profile transmitted herewith marked "C."

Grades ascending west.

Less than 10 feet per mile	22.05
From 10 to 20 feet per mile	18.66
From 20 to 30 feet per mile	11.45
From 30 to 40 feet per mile	14.60
From 40 to 50 feet per mile	11.69
From 50 to 60 feet per mile	15.

Grades ascending east.

Less than 10 feet per mile	17.03
From 10 to 20 feet per mile	8.88
From 20 to 30 feet per mile	9.07
From 30 to 40 feet per mile	9.98
From 40 to 50 feet per mile	18.51
From 50 to 60 feet per mile	1.86
Grade level	37.62
Total length of the division	196.40 miles.

30 Curves.

The sharpest curve on the division is 3 degrees. All the grades and curves come within the limits fixed by the Government and their number and extent are not greater than is justified by practical and economical construction.

Excavations and embankments.

The excavations comply with the requirements of the Government and are in good condition. Some of the embankments however are not fully up to the standard laid down in the instructions required for a first-class road, but they are all that is required for the present and near future business of the road, and we are assured by the officers of the company that they have made ample arrangements to bring them all up to the standard by a first-class road, in the coming spring.

Mechanical structures.

The number of bridges on the division is 58, described as follows: Howe truss bridges, 3 of 150-feet span each, with well-constructed trestle approaches; trestle bridges, 25; pile bridges 30; the aggregate approaches; trestle bridges, 25; pile feet and of the pile bridges 6,010 feet. The Howe trusses are substantially built, of sound material, and are in excellent condition. The trestle and pile bridges are also well constructed and fully adequate to the requirements of the traffic of the road. There are 170 culverts on the division of which 21 are box, 12 open and 137 pipe. These are of sufficient strength and capacity to serve their intended purpose and are all in good condition. The box and open culverts as well as the abutments of the bridges, are constructed of timber, no stone suitable for that purpose having been found within a reasonable distance on the line of the road.

Sidings.

The sidings on the division are 24 in number and their aggregate length is 38,555 feet. Their location is judicious and their capacity ample for all the present requirements of the business of the road.

Ballasting.

Going west from the Red River of the North the road-bed for a distance of about fifty miles is well ballasted with gravel. On a portion about thirty miles in length the embankments have been made generally of the material taken from the excavations, which is composed mainly of gravel and sand. This, with the corresponding excavations, makes about sixty miles of road. The balance of the road is made chiefly of material taken from the immediate vicinity of the line and the material varies in quality being part gravel, part sand and part clay, more or less mixed with the soil. We found the entire line of the road, lying between the Red River of the North and the Missouri river in a smooth condition (and its business well managed). Passenger and freight trains were running over it daily and regulary at fully the average rate of speed on other new roads. The freight received at Bismarck between June 8th and October 15th of the present year amounted to over eight thousand tons.

31

In our judgment the ballasting of the road has progressed as rapidly and thoroughly as has been prudent, having due regard to the climate and condition existing where gravel and stone do not largely enter into the composition of available material and having regard also to the length of time which should be given for the proper settling of new embankments, so large a portion of the road having been completed within the present year.

Cross-ties.

The cross-ties are laid 2,640 to the mile as the Government requires. About fifty per cent. of them are of Norway pine, about forty-two per cent. of tamarac- and about eight per cent. of oak and all are of dimensions, specified in the instructions of the department. The adoption of the fish-joint has obviated the necessity of making a choice of timber for the ties laid at the breakage of joints.

Rails.

The rails weigh 56 pounds to the yard, are of American manufacture, and in our judgment, meet the requirements of the Government both as to quality and manner of laying.

Rolling stock.

The rolling stock upon the division is as follows: Locomotives 28; passenger cars 10; mail, baggage and express cars 5; cabooses 11; platform cars 400; coal cars 19; box cars 240; tool car 1; pay car 1; derrick car 1; pile-driver 1; sand cars 30; rubble cars 30; gravel cars 90; snow-plows 5.

All this stock is in excellent condition and it is sufficient in quantity to do the present business of the road and also that increased business probable in the near future.

Engine-houses and repair shops.

The Northern Pacific Railroad Company has its main buildings and repair shops, extensive and well equipped, at Brainard, on the Minnesota division. There are branch shops at Fargo and
32 Bismarck, located respectively at the eastern and western terminus of this division. The buildings at Fargo are constructed of brick and with the main shops located at Brainard, of which this division has all the advantages, although they are not located directly on its line, furnish ample facilities for purposes of repair and protection of machinery. The company have on hand a stock of iron, wood and other material for building and repairing machinery and all necessary supplies for the immediate use of the road. There is also an engine-house located at Jamestown, nearly central between the termini of the division.

Passenger, freight, and water stations.

There are six freight and passenger stations on the division, varying in size from 12 x 16 feet to 20 x 65 feet, and built of wood. They are judiciously located with reference to the passenger and freight business of the division and are fully adequate to its present wants. The water stations are ten in number with an aggregate capacity of 201,850 gallons. They are substantially built on an approved plan, and provided with such protection against freezing as is deemed sufficient.

Snow-fences.

Alongside many of the deep excavations on the line the company have built snow-fences in double or single line, on either side according as the excavations are deep or shallow. Between the line of the track and these fences the spaces are about one hundred feet wide and the space between the rows of fencing, where it is double, is about the same width. The fences are eight feet high, the posts set two and a half feet in the ground and the boards are six inches wide, the spaces between them being four inches.

There are 37½ miles of snow-fences, of which 20 miles is single, and 17½ miles double.

Telegraph line.

The telegraph line along the division is well constructed and equipped, with facilities ample for the wants of the road and the public.

Conclusion.

As it may be questionable whether all of that portion of the road located from the 195th mile to the western terminus, should be treated as a part of the main line, we would respectfully call attention to its location as shown by the map marked "C" and forming a part of this report.

After a careful examination of the Dakota division of the North-

ern Pacific railroad commencing at the east bank of the Red
33 River of the North and terminating at the Missouri river in the Territory of Dakota being 196 $\frac{4}{10}$ miles in length, as appears by the affidavit of the president of the company and the map herewith marked "C," we find its construction and equipment throughout to be in accordance with the instructions furnished for our guidance by the Interior Department, and we therefore respectfully recommend the acceptance of the road by the Government.

We have the honor to be with great respect,

Your ob't servants,

GEO. W. STEELE,
A. C. SANDS,
WM. G. LE DUC,
Commissioners.

Subscribed and sworn to before me at the city of Washington, District of Columbia, this 25th day of November, 1873.

[SEAL.] THOMAS G. CONNOLLY,
Notary Public.

(Copy.)

Blank No. 1.

The Northwestern Telegraph Company.

The rules of this company require that all messages received for transmission, shall be written on the message blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following message:

C. H. Haskins, gen'l sup't, Milwaukee, Wis.; Z. G. Simmond, pres't; H. B. Hinsdale, sec'y, Kenosha, Wis.

No. 2.
Dated, Washington, D. C., Oct. 20, 1873.
Received at Bismarck, D. T., 11," 21st.

To Geo. W. Steele, W. G. Le Duc, A. C. Sands, commissioners:

Proceed with examination, affidavit can be obtained before mailing report.

C. DELANO, *Secretary.*

29 paid Gov't rt.
Via Atlantic & Pacific lines,
To Chicago, 3 ex. W. M. Date.
(Copy.)

34 NORTHERN PACIFIC RAILROAD COMPANY,
PRESIDENT'S OFFICE, 23 FIFTH AVENUE,
NEW YORK, *Oct.* 21, 1873.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

George W. Cass, being sworn, says that he is the president of the Northern Pacific Railroad Company, that the Dakota division of

the said company's road, which the President of the United States has appointed commissioners to examine, commences at Fargo on the west bank of Red river in Dakota Territory, and terminates at Bismarck on the east bank of the Missouri river, that the length of said division of road is $196\frac{4}{10}$ miles and that the said division of road is completed as required by law and the instructions of the Department of the Interior.

G. W. CASS.

Personally appeared before me, a notary public in and for the city and county of New York, George W. Cass, to me personally known and made oath that the contents of the above affidavit subscribed by him are true to the best of his knowledge and belief.

New York city, October 22d, 1873.

[SEAL.] M. TURNER FOREMAN (72),
Notary Public, N. Y. Co.

(Copy.)

The same being a true and correct copy of all of said Exhibit "2," as attached to said stipulation, except the map referred to as Exhibit "C," which said map is, by this reference thereto, made a part of and included in this bill of exceptions.

That said fact as agreed upon, and said copy of said report of said commissioners with the accompanying papers, having been offered in evidence on behalf of the said defendant in pursuance of the terms of said stipulation, upon consideration of the same, the plaintiff made objection thereto on the ground of the same being incompetent, irrelevant and immaterial; which said objection was sustained by the court, to which said ruling of said court holding such evidence to be incompetent, irrelevant and immaterial, the defendant then and there excepted, which said exception was allowed.

In pursuance of the stipulation, filed as aforesaid, there were offered and introduced in evidence, on behalf of the plaintiff on the trial of said cause, two (2) maps, the one certified by S. M. Stockslager, Commissioner of the General Land Office, under
35 date of April 27th, 1889, purporting to be a copy of a portion of the map of definite location of the Northern Pacific railroad, east of the Missouri river, a distance of twenty-four (24) miles, and to a point west of said river a distance of about six (6) miles; which said map, marked Exhibit "B," is attached to the stipulation hereinbefore referred to as having been filed in this cause; which said map as so attached to said stipulation is, by this reference thereto, made a part of and included in this bill of exceptions; and, the other of said maps, being certified by Thomas H. Carter, Commissioner of the General Land Office, under date of March 17th, 1892, purporting to be a copy of a diagram showing the general route, the map of which was accepted by the Secretary of the Interior, February 21st, 1872, and the definite location of the Northern Pacific railroad through township in ranges seventy-seven (77) seventy-eight (78), seventy-nine (79), eighty (80), and eighty-one

(81), west in North Dakota, where said road crosses the Missouri river, which said map marked Exhibit "C," is attached to the stipulation referred to as having been filed in this cause, which said map as so attached to said stipulation is, by this reference thereto, made a part of and included in this bill of exceptions. That said map having been offered and introduced as evidence on behalf of the plaintiff on the trial of said cause in accordance with the terms of said stipulation, upon consideration of the same the defendant made objection thereto on the ground that the same were and are not the best evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office, which said objection was overruled by the court, to which ruling of the court holding that said maps were competent and sufficient evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office, the defendant then and there excepted, which said exception was allowed.

That by virtue of the provisions of said stipulation it was agreed that the testimony of one Charles A. F. Morris, given in the case of The Saint Paul and Pacific Railroad Company *et al.* against The Northern Pacific Railroad Company, as contained in the printed transcript of record of cause number 344 on the docket of the Supreme Court of the United States, October term, 1889, a copy whereof marked Exhibit "3," is attached to the stipulation hereinbefore referred to as having been filed in this cause, should be considered as a part of the evidence in this case, subject to the objection and exception of the plaintiff as to the materiality, competency, and relevancy thereof.

36 That in pursuance of said agreement of said stipulation, said testimony was offered and introduced as evidence in this case on behalf of the defendant, and as so offered and introduced was and is as follows, to wit:

Q. Where do you reside, and what is your occupation or profession?

A. I reside in St. Paul; am a civil engineer by profession.

Q. State whether such variations in the line constructed or to be constructed from the line as surveyed and platted in Exhibit "6," were of frequent occurrence along the whole line.

A. Such changes and variations took place over a considerable portion of the line, necessarily caused by having to put in the curvature to connect (tange-ts) or straight lines, which were not originally staked on the location survey; also in a few instances changes were made by local petition of the inhabitants, such as at Osakis, St. Joe, Melrose, and other places.

Q. In making the survey of 1871, indicated by Exhibit "6," what was done on the ground?

A. The ground was examined carefully and a line of road selected and marked thereon by stakes driven in the ground at average distances of 100 feet; change of courses marked by large hubs. All natural features, such as rivers and elevations, noted.

Q. State what experience you have had in the matter of railroad engineering, Mr. Morris.

A. I have performed professional services on a great number of railroads, both in Europe and America; I spent 5½ years on the Hudson River railroad, Albany and Troy, 1 year; Chicago & Alton & St. Louis, several years, and until completed. In Minnesota I have been connected with the railroad system since it started; I assisted in the location of the lines of the first division of the St. Paul & Pacific Railroad Co., from St. Paul to Breckenridge, St. Paul to St. Cloud, as far as the office work was concerned, and located in the field the Winona branch. These Minnesota roads are all land grant roads.

Q. State whether or not on each of these land-grant roads with which you were connected, and on all other land-grant roads, as far as you know, a line of definite location does not proceed the work of construction.

A. It does.

Q. And those lines are filed with the governor, as in this case?

A. Always.

Q. State whether in the actual construction, it is not
37 necessary to depart, more or less, from this line, and fully explain the matter.

A. It is most always necessary to make changes from the original location, within reasonable limits, frequently called for by the curvature not being staked out on the original record maps, and by changes necessary to be made by bad marshes and lakes through which the original location ran, and which, on a close examination of the ground, preparatory to construction, admitted of improvements being made. Such changes, as far as I am aware of, were permitted and approved by the Government when within reasonable limits.

Q. By saying that the line of road indicated on Exhibit "6" is the line of definite location, you do not mean to say that it is the precise line upon which the road has been or is to be constructed, but that it is the approximate line of route?

A. It is not the precise line as shown in Exhibit 6 in all cases, but the general route between the terminal points is the same, only varied by changes necessitated by engineering necessities, as explained in my previous testimony.

Q. In making the survey of a line of railroad for construction, what is done by the engineers upon the ground?

A. They go on the ground and examine the location previously made and see if improvements can be made in any portion of the line between certain points about to be constructed; if the reconnoissance of the line would show that improvements can be made, experimental lines are run and staked on the ground, distances and levels taken with which to make comparisons with the original survey of definite location. If those new surveys show improvements can be made a new line designed for construction is laid out, staked, and prepared for grading and a new location tied up to the U. S. Government land surveys, showing the route and change of loca-

tion, if any, from the original definite location. Stakes are driven at an average distance, on a straight line, of 100 feet apart, and by large hubs at the tangent points when curves leave, which tangent hubs are usually tied up by witness stakes, so as to be replaced in case of being knocked down or destroyed. Curves are usually staked out at intervals of fifty feet. Afterward to prepare the work and make it plain to the contractors or laborers, grade stakes are placed at and opposite the stakes heretofore driven, marked with the height of the cut or fill plainly also stakes placed at the base or bottom of the slope on fills and on cuts where the slope commences.

Q. Have you not been just describing what is known in railroad engineering as the construction survey, as distinguished from the survey of definite location of the line?

A. Yes.

38 Q. Now describe the survey of definite location of the line as contradistinguished from the construction survey.

A. The country lying between the points designed to be connected with the line of railroad is first carefully examined by the engineer placed in charge of such survey. He takes notes of leading points that he designs to run by in the general direction of the proposed line, taking care to avoid all natural obstructions that should necessitate large cost and trouble to the company proposing to build the line. He then commences with his party to run out by course and distance and stake on the ground a proposed line, carefully noting all changes of courses, and taking the levels of line as he proceeds, in order to enable him to judge of the feasibility of the line he has previously staked out. If the line is satisfactory, he takes field-notes showing the general topography of the country adjoining and ties up or connects his line with the U. S. Government surveys, if they exist in the locality, so as to enable him to make an accurate map showing his location and the natural features of the country through which the route runs, his stakes being placed at intervals of 100 feet.

Q. Such line becomes a line upon the ground does it not?

A. It does.

Q. Was not the line of definite location marked upon Exhibit "6" established in the manner you have just described?

A. It was.

Q. Witness is shown Exhibit "2" and is asked to examine the continuous red line marked on said map, "Amended line Northern Pacific railroad," and asked to state if he is familiar with the general features of the country through which that line runs.

A. I have passed over that portion of it between Duluth and Georgetown, on the Red River of the North, several times.

Q. Describe the general features of the country with reference to engineering difficulties in the way of railroads.

A. The line coming westward from Duluth passes through a very rough country composed mostly of lofty hills of granite and trap rock, and intersected in various places by deep ravines and marshes, thence it passes out into a level country composed of nearly continuous marsh to where it strikes the Mississippi river; thence through

an alternately rough and marshy country interspersed with lakes and sink-holes—mud-holes. From Brainerd westward to the Otter Tail country the land is broken and rolling, partly covered with timber and partly prairie, interspersed with numerous lakes and marshes, so frequently met with that the distance between them appears very short indeed; thence to Georgetown the line
39 passes over a prairie country interspersed with numerous lakes and marshes the whole line presenting a difficult country to select a line that could be built with any degree of economy. From the numerous natural obstacles presenting themselves it would and did take a long time for the locating engineers to select a line that would be adapted for construction. When construction was going on it was found necessary to make certain local changes in the line caused by unfathomable sink-holes and marshes but which by superior engineering skill were successfully surmounted.

Q. Would it be possible for any corps of engineers to make a line of definite location of a railroad upon the line to which your attention has been called on Exhibit "2?"

A. It would be possible but highly absurd and injudicious to waste time and money in staking out a line in direct course, as shown on Exhibit "2," between Duluth and the west line of town 135, R. 39.

Q. In round numbers, what per cent. would be the increased cost of such a line over that of a line such as would ordinarily be selected by competent engineers?

A. I could not say nor do I believe any engineer could tell except by giving a wild guess at it, but I could say the expense would be very largely in excess of a line properly explored, probably from 50 to 100 per cent. more, so far as the road-bed is concerned.

Q. State whether any line that might be located by any engineer of competence through that country would not have about the same curvatures in the general course as the one actually located there and constructed by the plaintiff company.

A. I think so. I think the engineers who made that location were good and capable men, who devoted themselves for a long period and at a great expense in selecting the line they did.

Q. Is there any distinction between "the line of definite location" and "the line upon which the road is actually built or to be built?"

A. There is, particularly in regard to land-grant roads, as a definite location is a record required to be filed, showing the line of proposed road to be constructed. Construction location is a modification or elaboration of the definite location placed on the ground on the line of definite location when practicable, or contiguous thereto, with all the detail of curvature, grade, stakes, side stakes and slope stakes placed in their proper position for the guidance of parties about to commence construction.

That upon consideration of the same when offered and in-
40 troduced, the defendant made objection thereto on the ground of same being incompetent, irrelevant and immaterial; that said objection was sustained by the court, to which said ruling of

said court holding said evidence to be immaterial, incompetent and irrelevant, said defendant then and there excepted, which said exception was allowed by the court.

That by virtue of the provisions of the stipulation it was agreed between the parties in interest that subject to the plaintiff's objection and exception as to the competency, materiality and relevancy thereof, it was and is a fact that a certain action was theretofore commenced and prosecuted in the district court of the third judicial district within and for the Territory of Dakota, in the county of Burleigh, in favor of the Northern Pacific Railroad Company and against James Browning and others, including the plaintiff herein defendant, and that exhibits marked "4," "5," "6," "7" and "8" attached to the stipulation hereinbefore referred to as having been filed in this cause, are true copies of the record of said proceedings; that said fact as so agreed upon and said exhibits as attached to said stipulation, having been offered and introduced upon the trial of said cause, as evidence on behalf of the defendant in pursuance of the agreement of said stipulation; upon consideration of same objection was made thereto as evidence by the plaintiff on the ground that same was incompetent, irrelevant and immaterial; which said objection was sustained by the court, to which ruling of the court holding said evidence to be incompetent, irrelevant and immaterial the defendant then and there excepted, which said exception was allowed by the court.

That said Exhibits "4," "5," "6," "7," and "8" as so attached to said stipulation and offered and introduced upon said trial are, by this reference thereto, made a part of and included in this bill of exceptions.

That by virtue of the provisions of said stipulation it was agreed as between the parties in interest, that the value of the use and occupation of the premises in question for six (6) years prior to December 28th, 1891, the date of the commencement of this action, is the sum of twenty-six thousand dollars ($26,000) and that the value of the use and occupation of said premises, omitting that part thereof purporting to be affected by the proceedings set out in Exhibits "4," "5," "6," "7," and "8" is the sum of twenty-one thousand dollars ($21,000.00.)

By virtue of the provisions of said stipulation filed as aforesaid, it was agreed as between the parties in interest, that the testimony of Montgomery Meigs, a witness produced by the defendant,
41 a copy of which, marked Exhibit "9," is attached to the stipulation hereinbefore referred to as having been filed in this cause should be considered as part of the evidence in this cause, subject to the objection and exception of the plaintiff as to the materiality, competency and relevancy thereof.

That in pursuance of said agreement of said stipulation said testimony of said Montgomery Meigs was offered and introduced as evidence in this cause on behalf of the defendant, and, as so offered and introduced was and is as follows, to wit:

MONTGOMERY MEIGS testified as follows:

Examination.

By Mr. F. M. DUDLEY:

Q. Will you state your name, age, occupation and place of residence?

A. My name is Montgomery Meigs; United States civil engineer, stationed at Keokuk, Iowa; age 47.

Q. How long have you been a civil engineer?

A. Since 1874, United States civil engineer—civil engineer since 1870.

Q. Where were you engaged in 1870, 1871, 1872, and 1873?

A. On the line of the Northern Pacific railroad.

Q. At what points?

A. Between Brainerd and the Big Horn river—I was on those surveys.

Q. Are you familiar with the location of the Northern Pacific railroad at Bismarck, North Dakota, and between Bismarck and the Missouri river?

A. Yes.

Q. Did you have charge of the location of the road at those points?

A. Yes, I ran preliminary lines, and located the road from the second crossing of the Sheyenne river to Bismarck, and had charge of the construction of the line from a point fifty miles east of Bismarck to the Missouri river.

Q. Will you state at what points the said crossing of the Sheyenne appears on Exhibit "1"?

A. It appears to be a point 60 miles west of Moorhead.

Q. How is it marked on the exhibit?

A. "60 M."

Q. You located the road from there to the Missouri river?

A. I located from the James river, but I ran preliminary lines from this point—from the 60-mile point.

Q. And you located the road from the James river to the Missouri river?

42 A. Yes, and constructed the last fifty miles of it, ending at Bismarck.

Q. Will you state the character of the country in township 138 north of range 80 west, 5th principal meridian, traversed by the line of the Northern Pacific as located?

A. You mean as located?

Q. As located—not as constructed, but as located.

A. Well, there were two locations, there was one into Bismarck, called "Edwinton" on this Exhibit "A" (witness refers to exhibit), and one ending in section 17.

Q. Will you state when these locations were made?

A. In the spring of 1872, as I recollect. I started my surveys under great pressure, I was told to start a line and run it east, and locate as fast as possible, because there was an army of contractors

coming and it was necessary that they should have something to go to work on, and I used to run my preliminary line one day and go back and locate the next, very often without knowing whether I was going to get out or not—the original start may have been here (indicating on map), though I think it was further up Apple creek. My impression is that this line was run in the spring of 1873.

Q. This line you refer to is the line running into section 17, on Exhibit "A"?

A. Yes, the lower line. As I say, my memory about the sequence of these things—21 years ago—is somewhat indistinct.

Q. This line, the lower line of location, going into section 17, and shown on Exhibit "A," is substantially the same line, is it not, as that shown as the line of definite location on Exhibit "1"?

A. Yes.

Q. Was the road, as finally constructed, constructed on this line?

A. No, it was not.

Q. What, if any, work was done on that line of definite location?

A. A little grading was done—the contractors began work on this grading, as I recollect, and after a little work had been done orders were given for it to be discontinued.

Q. These orders were given by whom?

A. I think they were from headquarters—I could not say exactly but I think from Colonel Gaw, who was my immediate chief.

Q. And these orders were given to you, and by you given to the contractors?

A. Yes, they were.

43 Q. What was the nature of the country through which, or over which, this line of definite location extended?

A. The latter part of it, near the river, ran for two miles or more across the Missouri River bottom, though the southeast corner of section 9, the northwest corner of section 16 and section 17, as shown on "Exhibit A."

Q. That portion was through the Missouri River bottom?

A. Through the Missouri River bottom.

Q. Will you state what the nature of the land, and condition of the bottom is, through there?

A. The bottom is very low, and overflowed at high water—sometimes they have very high water.

Q. What evidence of overflows, if any, was there there?

A. There was on the terrace which bordered the bottoms a well-defined high-water mark of uncertain age, but distinctly to be seen, high above the bottom.

Q. And what, if any, grade would have been required in order to have constructed the road over this bottom, along the line of definite location?

A. My first orders were to put the grade, I think it was, 10 feet above high-water mark, and I so staked it out.

Q. That would make the grade how much?

A. That would leave the grade 24 feet high, if the mark was 14 feet up the bank, and it was at least that high.

Q. You state these were your first orders—were they changed?

A. I, very soon after sending my plat in, received orders to reduce the grade to a merely nominal one, sufficient to make a good road-bed without providing for overflow at all.

Q. When was that line abandoned?

A. I think before any but very little work had been done on it.

Q. And where was the line then located?

A. (Witness refers to "Exhibit 2.") The line by this new location was diverted through sections 1, 3, and 4, into the south edge of Edwinton.

Q. At what point did it diverge from the old location by the map?

A. I should say it diverged somewhere in the northern half of section 12.

Q. And what was the nature of the road-bed from this point of divergence to Bismarck, over which the constructed road runs?

A. It is high ground, of usual rolling character.

Q. Would any part of that line be overflowed by the Missouri river?

A. It is above high water.

44 Q. How far to the west did you have charge of this construction—simply to Bismarck?

A. Simply to the town of Bismarck—the track was laid into the bottoms, from Bismarck, after I had left on the first Stanley expedition.

Q. Had the road been located west of Bismarck at the time you left, that is, any portion of the grading done?

A. No, sir; you mean west of the river, or west of Bismarck?

Q. West of Bismarck?

A. I think I laid out a grade with a curve descending to the steamboat landing about a mile from the town, to the westward, towards the river.

Q. And what was the level of that line?

A. That descended to the low bottom, which was overflowed at high water.

Q. I will call your attention to "Exhibit 2," and to the line starting from the east edge of section 5, descending with a curve into the river bottom, extending about three-quarters of a mile along the river bank to a point marked Sta. 10371 x 40, and will ask you, first, if that curved line shows about substantially the line located by you extending westward from Bismarck, and, if so, does it show all the line as located by you, and if it shows more than all the line located by you, what portion of that line would show the line as located by yourself?

A. That line is, it seems to me, the same line that was contemplated when I left work to go on the Stanley expedition. I cannot say that I located this, but it was contemplated, and as I understand, constructed by my successor.

By Mr. H. F. STEVENS:

Q. You had been across the river, hadn't you?

A. Yes.

Q. And the line on the other side, as contemplated, struck about the same level, didn't it?

A. The only line we had on the other side was the line we had down here (indicating on map). The bottoms on the opposite side of the river are substantially the same, excepting they are timbered, as they are on the east side, and for some distance.

By Mr. DUDLEY:

Q. At what point on this "Exhibit 2" does the line west of Bismarck leave the high ground and descend to the river bottoms?

A. A short distance east of the 195th mile.

Q. How is the 195th mile indicated on the map, "Exhibit 2?"

A. "195 M." about three inches west of the plat of Bismarck.

45 By Mr. J. H. MITCHELL, JR.:

Q. Was the line, as constructed by you, carried to the western limits of Bismarck?

A. Well, Bismarck consisted of but few houses in those days. The line ended at the edge of the bluff, or within a block of the edge of the bluff, or terrace, on which the town stood—about one inch, on "Exhibit 2," east of the west line of section 4. When I was there we had not built down the bluff at all; it was done very soon afterwards, I think.

Q. What was the character of the work that you did beyond the point where your construction ended at that time?

A. None.

Q. Well, I mean as to location of line.

A. What was the end of it?

Q. Yes.

A. Well, I cannot say that I located that line, positively, I do not remember, but the line before mentioned, as shown on "Exhibit 2" agrees with what had been ordered done when I left.

Q. If you had carried the construction of the road across on the line as definitely located, what would have been the height of the banks?

A. My recollection is that the grades on my profile sent to headquarters provided for a high embankment.

Q. What was the height of your embankment, as required for construction, and as actually made for construction, through Bismarck?

A. Merely nominal—enough to bed the ties.

Q. Well, was that about the condition from the point of divergence of the constructed line from the located line, clear up to Bismarck?

A. Pretty much so—there was no difficulty whatever to be surmounted by that line.

Q. What would have been the required width of base line for the accommodation of a bank 40 feet high on this line of definite location?

A. A railroad embankment 40 feet high of usual proportions and slopes, would be nearly 140 feet wide at the bottom.

Q. Can you give just a rough estimate of the difference in cost of construction of these two lines—the line as definitely located and the line as actually constructed—considering the difference in grades from the point of divergence to the point where you constructed it in Bismarck, and to a point equally distant on the line of definite location from the point of divergence?

A. I should say the line as originally located would have cost more than the line actually constructed, by about the differ-
46 ence between a mile of embankment 2 feet high and a mile of embankment 40 or 14 feet high as the case may be.

By Mr. DUDLEY:

Q. You state that the line of definite location extends across the river bottoms, which are overflowed?

A. Yes.

Q. Would it be practicable to build a road across that bottom so that it would not be washed out, and to keep it above the high-water mark?

A. It would be enormously expensive.

Q. As an engineer, which do you consider the most eligible route, the one upon which the line was constructed, or the one shown upon the map of definite location?

A. The one upon which the line was constructed.

Q. Would it not be almost impossible to construct a road along the line of definite location, so that it would not be washed out by extreme high water?

A. Not impossible, but extremely expensive.

Q. Would there not always be danger of a grade across that bottom being washed out?

A. Always.

By Mr. MITCHELL:

Q. Would it be a practicable line, from an engineering standpoint?

A. I hardly think so, unless some great advantage was to be gained by it.

Cross-examination.

By Mr. H. F. STEVENS:

Q. As I understand you, this is largely a matter of recollection with you?

A. Very much so.

Q. And independent recollection—have you refreshed your recollection by any recent data?

A. The only records I have are some private letters written home during my connection with the Northern Pacific Railroad Company, and some sketches of the country made at that time, which, however, do not shed much light on this subject.

Q. I will ask you to read the question and answer, in the testi mony of C. A. F. Morris, in this case, as follows:

"Q. Now, describe the survey of definite location of the line, as contradistinguished from the construction survey."

Please read the answer following this, and state whether that is a correct statement of what was done with respect to the definite location of the Northern Pacific railroad, as testified to by you?

47 A. I think it is. Mr. Morris seems to have described very accurately the usual processes in railroad surveys for construction. It is, however, customary to change the line in places where experience, gained before the construction actually begins, shows that an improvement can be made, and this is often done.

That upon consideration of the same when offered and introduced, the plaintiff made objection thereto on the ground that same was incompetent, irrelevant and immaterial; that said objection was sustained by the court, to which said ruling of the court holding said evidence to be immaterial, incompetent and irrelevant, said defendant then and there excepted, which said exception was allowed by the court.

That by virtue of the provisions of said stipulation, filed as aforesaid, it was agreed between the parties in interest that upon the facts and evidence therein stipulated and hereinbefore set forth and subject to the terms of said stipulation above referred to, judgment should be entered as of the adjourned April, 1893, term of said court.

That said court having considered said facts and evidence as so stipulated and agreed upon by the parties, and as submitted upon the trial of said cause by virtue of the agreements of said stipulation, did upon the 16th day of March, A. D. 1894, make findings of fact and conclusions of law, and upon the making of said findings of fact and conclusions of law, the defendant, by its counsel, the counsel for plaintiff being present, thereupon requested the court to make some finding of fact based upon the testimony of Charles A. F. Morris, and of Montgomery Meigs, witnesses on behalf of defendant, as to the line as designated on the map of definite location of a line of railroad as generally filed, or as required to be filed, under the various congressional railroad land grant acts, not being the line as finally located for purposes of construction, and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed and that the term "definite location" as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction; which request for some finding of fact based upon said testimony was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth the defendant, by its counsel, excepted, which said exception was allowed.

And the defendant then and there requested the court to find, as

one of the facts in this cause, that the line as designated on
48 the map of definite location of a line of railroad as generally made or filed, or as required to be made or filed under the various congressional railroad land grant acts, is not the line as finally located for purposes of construction, and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed, and that the term "definite location" as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction, which request for finding of fact was refused by the court, to which refusal of the court to make said finding defendant, by its counsel, excepted, which exception was allowed.

And the defendant, further, by its counsel, requested the court that some finding of fact should be made by the court, based upon the testimony of Montgomery Meigs, a witness on behalf of the defendant, as to the necessity for the variations from the line as designated on the map of definite location, as filed by the defendant to the line as finally constructed and now in operation over the premises involved in this action, and as to the line as designated upon said map being impracticable for purposes of safe or economical operation, which said request for some finding of fact based upon said testimony was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth, the defendant, by its counsel, excepted, which said exception was allowed.

And the defendant then and there requested the court to find as one of the facts in this cause, that the line as designated on the map of definite location as filed by the defendant was not a line practicable for purposes of safe or economical operation, and that it became necessary in constructing the road of the defendant on the approach of the same from the east to the Missouri river, and (thro') the township in which the premises in question are situated, to vary from the line as designated on the map of definite location as filed, to the line as constructed through the premises in question, in order to obtain a line or route practicable for safe and economical operation, which said request for said finding of fact was refused by the court, to which said refusal of the court to make said find-, defendant, by its counsel, excepted, which said exception was allowed.

And the defendant then and there, by its counsel, further requested the court that some finding should be made by the court,
based upon the evidence submitted by agreement of the
49 parties under the terms of the stipulation hereinbefore referred to as having been filed in said cause, to the effect that after the road was constructed commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon, and that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the

Interior, under date of November 28, A. D. 1873, and was approved by the President under date of December 1, A. D. 1873, as shown by the papers and map accompanying said report, copies of which were attached to the stipulation hereinbefore referred to as having been filed in said cause, and for some finding of fact upon the question raised upon said examination and report, and its approval as aforesaid, as to whether, by virtue of said examination and report, and its acceptance and approval, the portion of the railroad constructed across the premises in question was accepted as a part of the main line of the Northern Pacific railroad, as authorized to be constructed by virtue of the provisions of the charter granted the defendant company by Congress, and as having been constructed in all respects in accordance with the terms of the provisions and requirements of said charter; which said request for some finding of fact based upon said testimony was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth, the defendant, by its counsel, then and there excepted, which said exception was allowed.

And the defendant, by its counsel, then and there requested the court to find, as one of the facts in this cause, that after the road was constructed commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873; that the portion of railroad constructed over the premises in question, was by virtue of said examination and report and the approval and acceptance thereof, duly accepted as a part of the main line of the Northern Pacific railroad, authorized to be constructed by the charter granted to said defendant company by Congress, and was thereby duly accepted as having been, in all respects, constructed as required by the terms, provisions and requirements of said charter; which said request for said finding of fact was then and there refused by the court, to which
50 refusal to make said finding, defendant, by its counsel, then and there excepted, which said exception was allowed.

That among the findings of fact hereinbefore referred to as having been made in said court was the following: "That the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars;" that upon said finding of fact having been made by the court, the defendant, by its counsel, then and there excepted to the same, which said exception was allowed by the court.

That defendant, by its counsel, then and there requested the court to find, as a fact in said cause, that the value of the use and occupation of the premises in question, for six years prior to December 28th, 1891, the date of the commencement of the action, is the sum of twenty-one thousand dollars, which said request for said finding of fact was refused by the court, to which refusal of the court to

make said finding, defendant, by its counsel, then and there excepted, which said exception was allowed.

That the conclusions of law as found by the court were as follows:

"That the plaintiff is entitled to the possession of the premises described in the complaint, and referred to in the findings of fact, and to recover from the defendant the sum of twenty-six thousand dollars, with interest thereon from the 28th day of December, A. D. 1891, at the rate of seven (7) per centum per annum, and his costs and disbursements."

That upon the making of said conclusions of law, the defendant then and there, by its counsel, excepted to the same, which said exception was allowed by the court.

And the defendant, further, by its counsel, requested the court to make some findings of fact based upon the evidence as agreed upon by the provisions of said stipulation and offered and introduced in evidence in pursuance thereof, to the effect that after the road was constructed, commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported; that their report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873; and that by virtue of said report and the approval thereof, said portion of road constructed
51 and now operated across the premises in question in this case, was accepted as a part of the main line of the Northern Pacific railroad authorized by the charter granted by Congress to said company, and as having been constructed in accordance with the terms, provisions and requirements thereof. Which said request for some finding of fact based upon said evidence was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth, the defendant, by its counsel, excepts, which said exception is allowed.

And the defendant then and there requested the court to find, as one of the facts in this cause, that after the road was constructed, commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported; that their report was forwarded to the President by the Secretary of the Interior under date of November 28, 1873; and was approved by the President under date of December 1st, 1873.

By virtue of said report and approval thereof, said portion of road constructed and now operated across the premises in question in this cause, was accepted as a part of the main line of the Northern Pacific railroad, authorized by the charter granted by Congress to said company as having been constructed in accordance with the terms, provisions and requirements thereof.

Which said request for said finding of fact is refused by the court,

to which said refusal of the court to make said finding the defendant, by its counsel, excepts, which said exception is allowed.

And the finding having been made by the court as hereinbefore set forth, that the value of the use and occupation of the premises in question for six (6) years prior to December 28th, 1891, the date of the commencement of this action, was the sum of twenty-six thousand dollars ($26,000.00), the defendant, by its counsel, at the time of making of said finding did then and there except to the making of the same, which said exception is allowed.

And the defendant, by its counsel, then and there requested the court to find that the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of this action, was the sum of twenty-one thousand dollars ($21,000.00), which said request for said finding of fact was refused by the court, to which said refusal of the
52 court, to make said finding, the defendant, by its counsel, then and there excepted, which said exception was allowed.

That upon the making and finding as conclusions of law, as hereinbefore set forth, that the plaintiff is entitled to the possession of the premises described in the complaint and referred to in the findings of fact, and to recover from the defendant the sum of twenty-six thousand dollars ($26,000.00), with interest thereon from the twenty-eighth day of December, A. D. 1891, at the rate of seven per centum per annum, and his costs and disbursements the defendant, by its counsel, then and there excepted to said conclusion of law as so made and found, which said exception is allowed.

That thereupon, on the said sixteenth day of March, 1894, judgment was entered in accordance with the order made by the court in furtherance and in pursuance of the conclusions of law made by the court as aforesaid.

And there is further made a part of this bill of exceptions the agreement of the parties in interest, by their respective counsel now present and consenting thereto, that any and all of the exhibits attached to the stipulation hereinbefore referred to as having been filed in this cause, copies of which are not made a part of this bill of exceptions, other than by reference, may be used and referred to by either party, in all proceedings that may be had in this cause, or upon any hearing of same upon any writ of error from the circuit court of appeals of the eighth circuit, to the above-entitled court or from the Supreme Court of the United States to the circuit court of appeals for the eighth circuit, in their original form as attached to said stipulation, or in the form of true and correct copies made therefrom.

UNITED STATES OF AMERICA,
District of North Dakota, Southwestern Division, } *ss:*

I, Alfred D. Thomas, United States district judge for the district of North Dakota, do hereby certify that the foregoing having been examined by me is found to be conformable to the truth and contains all the evidence given upon the trial of said action (except

such of the exhibits attached to the stipulation of facts filed in said cause, to which reference only is made in the foregoing), together with all objections to the evidence; the rulings thereon, and the exceptions thereto, taken, as well as the proceedings and motions made and entered on said trial and the rulings thereon and exceptions thereto and forasmuch as none of the matters aforesaid appear of record in said cause, I have, at the request of defendant's attorney, counsel for the plaintiff being present and consenting thereto, settled, signed, sealed and allowed the foregoing as and for the bill of exceptions in this cause this sixteenth day of March, 1894, within the term at which said cause was tried and within the time allowed by law and the rules of court for settling and allowance of the same.

53

ALFRED D. THOMAS,
United States District Judge for the District of North Dakota.

Upon the back of said bill of exceptions appear indorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota, southwestern division. Patrick R. Smith, def't in error, *vs.* Northern Pacific R. R. Co., pl'ff in error. Bill of exceptions. Filed March 16, 1894. J. A. Montgomery, clerk. F. M. Dudley & J. H. Mitchell, Jr., attorneys for defendant, St. Paul, Minn.

Thereupon, afterwards, to wit, on the 15th day of September, A. D. 1894, a stipulation was filed in said cause, which said stipulation was and is in words and figures following, to wit:

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

In the above-entitled cause it is stipulated that any and all of the exhibits attached to the stipulation referred to in the bill of exceptions as having been filed in this cause, copies of which are not made a part of said bill of exceptions, other than by reference, may be used, read and referred to by either party in all proceedings that may be had in this cause or upon any hearing of same upon any writ of error from the circuit court of appeals of the eighth circuit, to the above-entitled court, or from the Supreme Court of the United States to the circuit court of appeals for the eighth circuit, in their original form as attached to said stipulation, or in the form of true and correct copies made therefrom.

Dated at St. Paul, Sept. 14, 1894.

STEVENS, O'BRIEN & GLENN,
Attorneys for Plaintiff.
F. M. DUDLEY & J. H. MITCHELL, JR.,
Attorneys for Defendant.

Upon the back of said stipulation appear indorsements in words and figures following, to wit:

54 U. S. circuit court, district of North Dakota, southwestern division. Patrick R. Smith *vs.* Northern Pacific R. R. Co. Stipulation. Filed Sept. 15, 1894. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, assignment of errors was filed in said court, which said assignment of errors is in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error.

Assignment of Errors.

In the following-entitled action:

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

And now comes the said plaintiff in error, The Northern Pacific Railroad Company, which was the defendant in the above-entitled action in said circuit court, by F. M. Dudley and J. H. Mitchell, Jr., its attorneys, and says that in the record and proceedings in the above-entitled action in said court there is manifest error, in this, to wit:

First.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error, the fact, as stipulated and agreed upon by the parties plaintiff and defendant, that after the road was constructed commissioners were duly appointed by the President under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duties and duly reported, which report was forwarded to the President by the Secretary of the Interior under date of November 28, 1873, and was approved by the President under date of December 1st, 1873, and in sustaining the objection of the defendant in error to the admission of said fact as evidence, on the ground of same being incompetent, irrelevant and immaterial.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error, the true and authenticated copy of said commissioner's report, together with the accompanying papers and the certain map thereto attached and therein referred to as "Ex-

55 hibit C," all of which was, for identification, marked "Exhibit 2," of the record in this case. And said court erred in

sustaining the objection of the defendant in error to said report, map and accompanying papers, on the ground of the same being incompetent, irrelevant and immaterial.

Second.

That the court erred in admitting in evidence Exhibit "B" and "C," offered on behalf of defendant in error, said exhibits being respectively as follows:

Exhibit "B" map certified by S. M. Stockslager, Commissioner of the General Land Office, under date of April 27th, 1889, purporting to be a copy of a portion of the map of definite location of the Northern Pacific railroad, east of the Missouri river, a distance of 24 miles, and to a point west of said river, a distance of about six miles.

Exhibit "C." A map, certified by Thomas H. Carter, Commissioner of the General Land Office, under date of March 17th, 1892, purporting to be a copy of a diagram showing the general route of the Northern Pacific main line, the map of which was accepted by the Secretary of the Interior, February 21st, 1872, and the definite location of the Northern Pacific railroad through townships in ranges 77, 78, 79, 80 and 81, west, in North Dakota, where said road crosses the Missouri river.

The court having erred in overruling the objection of the plaintiff in error to said evidence, on the ground that the said maps were not the best evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office.

Third.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error the testimony of Charles A. F. Morris, a civil engineer, in the case of The St. Paul & Pacific Railroad Company *et al.* against The Northern Pacific Railroad Company, as contained in the printed transcript of record of cause No. 344 on the docket of the Supreme Court of the United States, October term, 1889, and agreed upon stipulation of the parties to this action as testimony to be offered on behalf of plaintiff in error, subject to objection and exception of plaintiff as to materiality, competency and relevancy thereof, a copy of which said testimony, as the same appears of record in this action, is marked for identification, Defendant's Exhibit 3, said testimony being to the effect that the line as designated on the map of definite location of a line of railroad,
as generally filed, or as required to be filed, under the vari-
56 ous congressional railroad land-grant acts, was not the line
as finally located for purposes of construction, and that it is frequently necessary, in construction of a line of railroad, to vary from the line as designated upon the map of definite location as filed, and that the term "definite location," as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction.

That the court erred in sustaining the objection of defendant in error to the admission of said testimony as evidence, on the ground of the same being irrelevant, incompetent and immaterial.

Fourth.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error, the fact, agreed upon by stipulation of the parties plaintiff and defendant, that a certain action was theretofore commenced and prosecuted in the district court, third judicial district, within and for the Territory of Dakota, in the county of Burleigh, in favor of the Northern Pacific Railroad Company and against James Brown, and others, including the plaintiff, defendant in error, herein, as defendants—and refusing to admit as evidence on behalf of the plaintiff in error the certain true and certified copies of the records of said proceedings, which, for purposes of identification, were marked "Defendant's Exhibits 4, 5, 6, 7, and 8" said exhibits being respectively as follows:

Exhibit 4. Summons in said action, served September 3rd, 1877.

Exhibit 5. The complaint in said action—the same being for the possession of a tract of land in the city of Bismarck, in said county of Burleigh, described as follows: "Commencing at the corner of Main and Third streets, in the city of Bismarck, and running south along the east line of Third street seventy-five feet; thence east fifty feet; thence north to the south line of Main street, thence west, on the south line of Main street, to the place of beginning," and for the sum of five hundred dollars for the plaintiff's damages for the withholding of the same, and costs; which complaint was filed in the office of the clerk of said court on the 1st day of September, 1877.

Exhibit 6. Being the demurrer of the defendant, Patrick R. Smith, to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, in that it did not appear that the plaintiff was entitled to possession of the premises described in the complaint, which demurrer was dated November 17th, 1877.

57 Exhibit 7. Notice of application for judgment in favor of the plaintiff in said action, on the demurrer therein as frivolous which was dated January 30th, 1878.

Exhibit 8. Being an order for judgment in said action in favor of the plaintiff for the possession of the real estate described in the complaint, Exhibit 5, and for six cents damages for the withholding of the possession thereof, and fifteen dollars costs, which order for judgment was dated January 31st, 1878, and filed in the office of the clerk of said court, January 31st, 1878.

That the court erred in sustaining the objection of the defendant in error to the admission of said fact as agreed upon, in evidence, and to the said several exhibits hereinbefore referred to as evidence thereof, on the ground that the same were incompetent, irrelevant and immaterial.

Fifth.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error the testimony of Montgomery Meigs, a civil engineer, a witness produced by the defendant, and agreed upon by stipulation of the parties to be as contained in the copy thereof marked, for the purposes of identification, as Defendant's Exhibit 9, which said testimony was to the effect that the variations from the line of road as designated on the map of definite location, as filed by the defendant, the plaintiff in error herein, to the line as finally constructed and now in operation over the premises involved in this action, were necessary, and that the line as designated upon the map of definite location as filed was impracticable for the purpose of safe and (economical) operation.

That the court erred in sustaining the objection of the defendant in error to the admission of said testimony, on the ground of same being incompetent, irrelevant and immaterial.

Sixth.

That the court erred in refusing to make any finding of fact based upon the testimony of Charles A. F. Morris, and of Montgomery Meigs, as to the line as designated on the map of definite location of a railroad, as generally filed, under the various congressional railroad land grant acts, being the line as finally located for the purposes of construction, and that it is frequently necessary, in the construction of a line of railroad, to vary from the line as designated upon the map of definite location as filed, and that
58 the term "definite location" as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction.

That the court erred in refusing to find, as one of the facts in said cause, as requested by the plaintiff in error, that the line as designated upon the map of definite location of a railroad, as generally made or filed, or as required to be made or filed, under the various congressional railroad land grant acts, is not the line as finally located for purposes of construction, and that it is frequently necessary, in the construction of a line of railroad, to vary from the line designated upon the map of definite location as filed, and that the term "definite location" was used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction.

Seventh.

That the court erred in refusing to make any finding of fact based upon the testimony of Montgomery Meigs, witness on behalf of the plaintiff in error, as to the necessity for the variations from the line as designated on the map of definite location, as filed by the defendant, to the line as finally constructed and now in operation over the premises involved in this action, and as to the line as desig-

nated upon the map being impracticable for purposes of safe or economical operation.

That the court erred in refusing to find, as a fact in said cause, as requested by the plaintiff in error, that the line as designated on the map of definite location as filed by the defendant, plaintiff in error herein, was not a line practicable for purposes of safe or economical operation, and that it became necessary in constructing the road of the defendant and the approach of the same from the east to the Missouri river, and through the township in which the premises in question are situated, to vary from the line as designated on the map of definite location as filed, to the line as constructed through the premises in question, in order to obtain a line or route practicable for safe and economical operation.

That the court erred in refusing to make any finding of fact, based upon the evidence submitted by agreement of the parties under the terms of the stipulation filed in said cause, to the effect that after the road was constructed commissioners were duly appointed by the President, under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon, and that they performed their duties and duly
59 reported, which report was forwarded to the President by the Secretary of the Interior, under date of November 28th, A. D. 1873, and was approved by the President under date of December 1st, 1873, as shown by the papers and map accompanying said report, hereinbefore referred to.

And the court erred in refusing to make any finding of fact upon the question raised upon said examination and report, and its approval, as aforesaid, as to whether, by virtue of said examination and report, and its acceptance and approval, the portion of the railroad constructed across the premises in question was accepted as a part of the main line of the Northern Pacific railroad, as authorized to be constructed by virtue of the provisions of the charter granted the defendant company by Congress, and as having been constructed in all respects in accordance with the terms and provisions and requirements of said charter.

Eighth.

That the court erred in refusing to find, as one of the facts in said cause, as requested by plaintiff in error, that after the road was constructed commissioners were duly appointed by the President, under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon, and that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873, that the portion of railroad constructed over the premises in question was, by virtue of said examination and report, and the approval and acceptance thereof, duly accepted as a part of the main line of the Northern Pacific railroad, authorized to be constructed by the charter granted the said defendant com-

pany by Congress, and was thereby duly accepted as having been in all respects constructed as required by the terms, provisions and requirements of said charter.

Ninth.

That the court erred in finding, as one of the facts in said cause, that the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of said action, was the sum of twenty-six thousand dollars ($26,000.00).

Tenth.

That the court erred in refusing to find, as one of the facts in said cause, as requested by the plaintiff in error, that the value
60 of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of the action, was the sum of twenty-one thousand dollars ($21,000.00).

Eleventh.

That the court erred in (find-), as a conclusion of law in said cause, that the plaintiff, defendant in error herein, is entitled to the possession of the premises described in the complaint, and referred to in the findings of fact, and in finding, as a conclusion of law, that the plaintiff is entitled to recover from the defendant the sum of twenty-six thousand dollars ($26,000.00) with interest thereon from the 28th day of December, A. D. 1891, at the rate of seven (7) per cent. per annum, and his costs and disbursements.

Twelfth.

That the court erred in rendering judgment in favor of the plaintiff, the defendant in error, against the defendant, the plaintiff in error, as was done under date of March 16th, 1894, to the effect that the plaintiff is, and ever since a period anterior to the 28th day of December, A. D. 1885, has been, the owner in fee-simple and entitled to the possession of that certain real property described in the complaint, and further known and described as lots 5, 6, 7, 8, 9, 10, 11 and 12, all inclusive in block 8, city of Bismarck, formerly known as Edwinton, according to the plat thereof on file and of record in the office of the register of deeds of the county of Burleigh, State of North Dakota, and that defendant, plaintiff in error, has wrongfully and unlawfully withheld the possession thereof from said plaintiff, defendant in error, for a period of six years prior to the 28th day of December, A. D. 1891.

And the court erred in adjudging and determining, by such judgment as was made and rendered, that said plaintiff, defendant in error, was entitled to recover from said defendant, plaintiff in error, the sum of thirty thousand and twenty-four dollars and twenty-one cents ($30,024.21) as damages for the withholding of said property, together with the sum of seventy-five and $\frac{77}{100}$ dollars ($75.77) his costs and disbursements.

Thirteenth.

That the court erred in not rendering judgment in favor of the defendant, plaintiff in error, against the plaintiff, defendant in error, and in not adjudging and determining that the defendant, plaintiff in error, is, and was at all times mentioned in the complaint, the owner in fee-simple and entitled to the possession of said premises, and that said defendant, plaintiff in error, was and is entitled
61 to recover from said plaintiff, defendant in error, its costs and disbursements in said action.

Wherefore, the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment of said circuit court of the United States for the district of North Dakota, southwestern division, may be reversed, and that such further matters be done therein as of right and according to the laws and customs of the United States should be done.

F. M. DUDLEY &
J. H. MITCHELL, JR.,
Attorneys for Plaintiff in Error.

Dated this 14th day of September, A. D. 1894.

Upon the back of said assignment of errors, appear indorsements in words and figures following, to wit:

U. S. circuit court of appeals, 8th circuit. Northern Pacific Railroad Co., plaintiff in error, *vs.* Patrick R. Smith, defendant in error. Assignment of errors. Filed Sept. 15, 1894. J. A. Montgomery, clerk. F. M. Dudley and J. H. Mitchell, Jr., att'ys for pl'ff in error, St. Paul, Minn.

Thereupon afterwards, to wit, on the said 15th day of September, a petition for writ of error was filed in said case, which said petition for writ of error is in words and figures following, to wit:

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the honorable judges of the United States circuit court of appeals for the eighth circuit:

Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United States circuit court for the district of North Dakota, southwestern division, in the above-entitled cause, a manifest error hath happened to the great damage of your petitioner in this: that a great manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage, all of which will more fully appear by the record of said court in said case.

Wherefore your petitioner prays your honors to allow a writ of error from the United States circuit court of appeals for the eighth circuit, to be directed to said United States circuit court for
62 the district of North Dakota, southwestern division, whereby under the seal of the said United States circuit court for the district of North Dakota, southwestern division, the record and proceedings aforesaid, with all things concerning the same may be transmitted to the United States circuit court of appeals, eighth circuit, with said writ of error, and that the record and proceedings aforesaid, being duly inspected, the said United States circuit court of appeals, eighth circuit, will cause further to be done therein and correct that error, what of right and according to the laws and customs of the United States, should be done.

Dated at St. Paul, September 14th, 1884.

F. M. DUDLEY &
J. H. MITCHELL, JR.,
Attorneys for Petitioner.

Upon the back of said petition for writ of error appear indorsements in words and figures following, to wit:

Original. U. S. circuit court, district of North Dakota, southwestern division. Patrick R. Smith, defendant in error, *vs.* Northern Pacific R. R. Co., pl'ff in error. Petition for writ of error. Filed Sept. 15", 1894. J. A. Montgomery, clerk. F. M. Dudley & J. H. Mitchell, Jr., attorneys for defendants, St. Paul, Minn.

Thereupon, afterwards, to wit, on the said 15" day of March, A. D. 1894, a writ of error was issued in said case, of which said writ of error the following is the original:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the United States circuit court, district of North Dakota, southwestern division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the adjourned April term, 1893, thereof, convened March 1st, 1894, between Patrick R. Smith and The Northern Pacific Railroad Company, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send
63 the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, within sixty days

from the date thereof, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15" day of September, in the year of our Lord, one thousand eight hundred and ninety-four. Issued at office in Fargo, North Dakota, with the seal of the circuit court aforesaid, and dated as aforesaid.

Circuit Court of the United States, District of North Dakota.

J. A. MONTGOMERY,
Clerk of United States Circuit (Circuit) *Court for the District of North Dakota, Southwestern Division.*

Allowed by—
WALTER H. SANBORN,
United States Circuit Judge, Eighth Judicial Circuit.

St. Paul, Sept. 14, 1894.

UNITED STATES OF AMERICA, *District of North Dakota,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribed my name and affix the seal of the circuit court of the United States for the district of North Dakota, this 1" day of November, A. D. 1894.

Circuit Court of the United States, District of North Dakota.

J. A. MONTGOMERY,
Clerk U. S. Circuit Court, District of North Dakota,
By H. G. EDWARDS,
Deputy Clerk.

64 United States circuit court of appeals, eighth circuit. Northern Pacific Railroad Co., plaintiff in error, *vs.* Patrick R. Smith. Writ of error. Filed Sept. 15, 1894. J. A. Montgomery, clerk. F. M. Dudley and J. H. Mitchell, Jr., att'y- for plaintiff in error.

Thereupon afterwards, to wit, on the said 15" day of September, A. D. 1894, a citation was issued in said case, of which said citation the following is the original:

United States of America to Patrick R. Smith, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this

citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of North Dakota, southwestern division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, United States circuit judge for the eighth judicial circuit this 15" day of September, A. D. 1894.

WALTER H. SANBORN,
U. S. Circuit Judge, Eighth Circuit.

United States circuit court of appeals, eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith. Citation. Due service at St. Paul, Minnesota, this 15th day of September, 1894, of the within citation is hereby admitted. Stevens, O'Brien & Glenn, att'ys for def't in error. F. M. Dudley & John H. Mitchell, att'ys for plaintiff in error. Filed Sept. 15, 1894. J. A. Montgomery, clerk.

Thereupon afterwards, to wit, on the said 15" day of March, 1894, a bond for costs was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents: that we, The Northern Pacific Railroad Company, by J. H. Mitchell, Jr., its attorney as principal, and J. W. Kendrick and M. P. Martin, of St. Paul, Minnesota, as sureties, are held and firmly bound unto Patrick R. Smith, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Patrick R. Smith, his heirs, executors, administrators, or
65 assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fourteenth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately at the adjourned April 1893 term of the U. S. circuit court, district of North Dakota, southwestern division, convened March 1st, 1894, in a suit depending in said court between Patrick R. Smith, plaintiff, and Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant, and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Patrick R. Smith, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect, and answer all costs if it fail to make good its plea,

then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By J. H. MITCHELL, JR.
J. W. KENDRICK.
M. P. MARTIN.

In presence of—

JOHN G. DRESEN,
G. H. CLURR.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this fourteenth day of September, A. D. 1894, personally came before me J. W. Kendrick and M. P. Martin, the same persons who signed and sealed the foregoing instrument, and each having been first duly sworn, did depose and say, that he is a resident and freeholder of this State, and worth the sum of one thousand dollars over and above his debts and liabilities, and property exempt from levy and sale under execution.

J. W. KENDRICK.
M. P. MARTIN.

Subscribed and sworn to before me this fourteenth day of September, A. D. 1894.

JOHN G. DRESSEN,
[L. S.] *Notary Public, Ramsey County, Minnesota.*

66 Upon the back of said bond appear indorsements in words and figures following to wit:

United States circuit court of appeals, eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith. Cost bond. The within bond and sufficiency of sureties thereon approved this 14th day of September, 1894. Walter H. Sanborn, U. S. circuit judge. F. M. Dudley and J. H. Mitchell, Jr., att'ys for plaintiff in error. Filed Sept. 15, 1894. J. A. Montgomery, clerk.

UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

I, J. A. Montgomery, clerk of the United States circuit court for the district of North Dakota, eighth circuit, do hereby certify that the foregoing pages from one to 84 contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk, and of the whole thereof, and the indorsements thereon, in the case of Patrick R. Smith *versus* The Northern Pacific Railroad Company.

Circuit Court of the United States, District of North Dakota.

Witness my hand and the seal of said circuit court, at Fargo, in said district, this 1" day of November, A. D. 1894.

J. A. MONTGOMERY, *Clerk*,
By H. G. EDWARDS, *Deputy*.

Filed Nov. 8, 1894.

JOHN D. JORDAN, *Clerk*.

67 And on the sixteenth day of November, A. D. 1894, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH. } No. 556.

The clerk will enter my appearance as counsel for the plaintiff in error.

J. H. MITCHELL, JR.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 556. Northern Pacific Railroad Co., pl'ff in error, *vs.* Patrick R. Smith. Appearance. Filed Nov. 16, 1894. John D. Jordan, clerk. J. H. Mitchell, Jr., counsel for pl'ff in error."

And on the twenty-first day of February, A. D. 1895, an appearance for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

THE NORTHERN PACIFIC R. R. Co., Plaintiff in Error,
vs.
PATRICK R. SMITH. } No. 556.

The clerk will enter my appearance as counsel for the defendant in error.

H. F. STEVENS.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 556. The Nor. Pac. R. R. Co., pl'ff in error,
68 *vs.* Patrick R. Smith. Appearance. Filed Feb. 21, 1895. John D. Jordan, clerk. H. F. Stevens, St. Paul, Minn., counsel for def't in error."

And on the thirteenth day of May, A. D. 1895, an appearance of certain other counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH. } No. 556.

The clerk will enter my appearance as counsel for the plaintiff in error.

CHARLES W. BUNN.
F. W. M. CUTCHEON.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 556. Northern Pacific R. R. Co., plaintiff in error, *vs.* Patrick R. Smith. Appearance. Filed May 13, 1895. John D. Jordan, clerk. Charles W. Bunn and F. W. M. Cutcheon, counsel for plaintiff in error."

And on the thirteenth day of May, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *May* 13, 1895.

69 NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error. } No. 556.

In error to the circuit court of the United States for the district of North Dakota.

This cause having been called for hearing in its regular order, the same was argued by Mr. F. W. M. Cutcheon and Mr. Charles W. Bunn in behalf of the plaintiff in error and by Mr. H. F. Stevens for the defendant in error. Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the nineteenth day of August, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

70 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1895.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* PATRICK R. SMITH, Defendant in Error.	No. 556. In Error to the Circuit Court of the United States for the District of North Dakota.

Mr. C. W. Bunn and Mr. F. W. M. Cutcheon for plaintiff in error.
Mr. H. F. Stevens for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

SANBORN, *J.*, delivered the opinion of the court:

This was an action brought by the defendant in error, Patrick R. Smith, against The Northern Pacific Railroad Company, the plaintiff in error, for the possession of certain lots in the city of Bismarck in the State of North Dakota, and for damages for withholding the same. It was tried by the court upon an agreed statement of facts and judgment was rendered for the defendant in error. This was the second trial of the case. On the first trial a judgment was rendered for the plaintiff in error, which was reversed in this court at the May term in 1893. In the opinion then rendered, which is reported in Smith *vs.* Northern Pacific Railroad Company, 58 Fed. Rep. 513, 7 C. C. A. 397, all the issues are stated and the views of this court upon all the alleged errors of law now assigned, except one, are expressed. We adhere to the conclusion then reached and refer to that opinion for the grounds of our decision.

71 The alleged error which was not considered in that opinion is, that the court below refused to admit in evidence the pleadings and judgment in an action between the parties to this action through which the railroad company recovered possession of a part of the property in controversy in 1878. In its complaint in that action the railroad company alleged that in May, 1873, "it became seized for the use and purpose of a right of way" of that portion of the property in question which is described in the complaint in that action and that the defendant in error, Smith, was unlawfully in possession of it as tenant of other parties who entered as trespassers and were defendants in that action. The defendant in error filed a general demurrer to that complaint. The company moved for judgment on the demurrer as frivolous, and it was granted on January 31, 1878. This was the record that was rejected by the court below as immaterial. Testimony tending to prove that the property described in that record was a part of the lots in controversy in this action was also offered and rejected by the court on the same ground.

The ground on which it is contended that these rulings are erroneous is that this record and testimony proved that the title to the property described in the complaint in that action was *res adju-*

dicata between the parties to this action, and that the judgment rendered in 1878 constituted a bar to the recovery of the property described in it by the defendant in error in this action. The argument is, that it was alleged in the complaint in that action that the railroad company was "seized in fee for the use and purpose of a right of way," of the real estate described in it, that the judgment was an adjudication that it was so seized and that that decision barred the defendant in error from contesting that question in this action. This view of the case, however, overlooks two decisive facts disclosed by this record—(1) that the defendant in error did not acquire the title on which he founds this action until more than a year after that judgment was rendered, and (2) that the question whether or not the railroad company was seized in fee or otherwise of the property in question was not put in issue and was not tried in the former action; the only question tried was that raised by the demurrer, whether or not the railroad company was entitled to possession of the property if it was seized in fee for the purpose of a right of way and the defendant was wrongfully in possession as the tenant of trespassers.

The general rule is that whenever the same question has been in issue, has been tried, and judgment has been rendered, that judgment is conclusive in a subsequent action between the same parties and their privies. This rule governs actions for the recovery of the possession of real estate in the State of North Dakota, for the fictions of the old action of ejectment at common law were abolished in that State and in the Territory which it succeeded before either of these actions was brought, and the real parties in interest were required by the code of that Territory and State to be the parties to
72 these actions. Sections 33, 34, 74, 635, 651 Code of Civil Procedure of the Territory of Dakota (Revised Code of Dakota 1877), sections 4830, 4832, 4870, 5449–5465 Compiled Laws of Dakota 1887. But under this rule the former judgment is not conclusive of questions that could not have been and were not tried and determined between these parties in the earlier action. In actions for the recovery of real property under this code, the former judgment is a bar when the titles and defences are the same in both actions, but it is not a bar to a subsequent action or defence founded on a title that was not and could not have been interposed in the earlier action. Hence an action or defence founded upon a title acquired by either of the parties subsequent to the judgment, is in no way affected by it, because it could not have been tried or determined by the former judgment. A stranger to the earlier action could maintain against any of the parties to it any title or right which he held when the judgment was rendered or which he acquired subsequent to its date. Any of the parties to the action, therefore, may, after the judgment, acquire any right or title to the property he can obtain, and may maintain it, against the parties to the former action with the same force and effect as a stranger. A judgment in an action for the recovery of real property is not a bar to a subsequent action brought or defence interposed by either of the parties to it when that action or defence is founded on an

after-acquired title. Barrows *v.* Kindred, 4 Wall. 399; Hardy *v.* Johnson, 1 Wall. 371; Foster *v.* Evans, 51 Mo. 39; Mahoney *v.* Van Winkle, 33 Cal. 448, 457; Emerson *v.* Sansome, 41 Cal. 552; Black on Judgments, sec. 656; Freeman on Judgments, secs. 301, 302.

The title of the defendant in error in this action was acquired subsequent to the former judgment. The question in this case was whether or not this after-acquired title was superior to the alleged title of the plaintiff in error. That question could not have been and was not tried in the former action, and therefore the pleadings and judgment in that action were immaterial and were rightly rejected. The judgment below must be affirmed and it is so ordered.

Filed August 19, 1895.

73 And on the nineteenth day of August, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *August* 19, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error. } No. 556.

In error to the circuit court of the United States for the district of North Dakota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of North Dakota and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Patrick R. Smith have and recover against the Northern Pacific Railroad Company the sum of twenty dollars for his costs herein and have execution therefor.

August 19, 1895.

And on the eighteenth day of October, A. D. 1895, an application for an order staying mandate was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error.

Application is hereby made upon the affidavit of J. H.
74 Mitchell, Jr., herewith submitted, for an order staying the sending down of the mandate in this cause to and including the 28th day of October, A. D. 1895.

C. W. BUNN AND
J. H. MITCHELL, JR.,
Attorneys for Plaintiff in Error, N. P. R. R., Gen'l Office Bldg., St. Paul.

Endorsed: "U. S. circuit court of appeals, eighth circuit. N. P. R. R. Co. *vs.* Patrick R. Smith. Application for order staying mandate. C. W. Bunn and J. H. Mitchell, Jr. Filed Oct. 18, 1895. John D. Jordan, clerk."

And on the eighteenth day of October, A. D. 1895, an affidavit of J. H. Mitchell, Jr., in support of the application for order staying mandate was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error.

UNITED STATES OF AMERICA,
State of Minnesota, County of Ramsey, } *ss:*

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says that C. W. Bunn, who, at the time of the argument and presentation and rendition of judgment in the above-entitled cause in this court, was, ever since has been, and now is the counsel for the plaintiff in error, has had since the rendition of said judgment charge and direction of all matters pertaining to the determination of whether or not said cause should be appealed to the Supreme
Court of the United States and the suing out of writ of error
75 for the prosecution of said appeal; that this affiant has ascertained that it has been ever since the rendition of said judgment and is now the purpose and intention of said plaintiff in error and the said C. W. Bunn, as counsel for the same, to prosecute an appeal to said cause by the suing out of a writ of error of the United States Supreme Court to the above-entitled court within the time which will allow the same to operate as a supersedeas, and that it was and is the purpose of said Bunn to look after and personally give direction to the suing of said writ of error.

That this affiant has been, ever since the rendition of said judgment, and is now, an assistant counsel for plaintiff in error, acting

in all matters pertaining to the handling of its business in court under the instructions and directions of said Bunn.

That said Bunn was on last Sunday, October 13th, in receipt of telegram, at St. Paul from New York, calling him to the latter city on important business; that said telegram was not received until within an hour or two of the departure of the last train on that day upon which he could take passage from St. Paul for New York; that he did not have time after receipt of said telegram and before leaving to communicate with this affiant or any other assistant or representative of plaintiff in error, or to leave any instructions with any representative relative to anything to be done in this said cause or any business of said plaintiff in error; that this affiant did not have in charge and has not had in charge, since the rendition of said judgment, any matters pertaining to the prosecution of appeal or suing out writ of error in this cause; that this affiant learned for the first time yesterday that the mandate in said cause was subject, under the rule of court, unless stayed by special order, to be sent down to the circuit court for the district of North Dakota at any time after this date; that this affiant, knowing that it was the purpose of said Bunn to sue out writ of error for the prosecution of said appeal, at once prepared an application for an order staying said mandate, and has prepared the necessary form of bond and
76 writ of error to be forwarded this day to the Supreme Court justice assigned to the eighth circuit for allowance; that said papers can be forwarded and application for and allowance of writ of error and issuance of same, with return of necessary papers to clerk of circuit court of appeals for record, file, and issuance, can all be done and performed within the time requested for the stay of said mandate, namely, until October 28th, 1895, and within the time required for the allowance and issuance of said writ of error to operate as a supersedeas; that said Bunn is this day engaged in the argument of an important cause, in which the plaintiff in error is a party, in the United States circuit court for the district of New York, and expects to return to St. Paul as soon as the hearing is concluded; that said Bunn was not aware at the time of his leaving that the time for the sending down of said mandate was so near at hand, and was acting upon the understanding that he would have sufficient time after his return for the suing out of said writ of error.

J. H. MITCHELL, JR.

Subscribed and sworn to before me this 18th day of October, A. D. 1895.

[SEAL.] JOHN G. DRESEN,
Notary Public, Ramsey County, Minnesota.

Endorsed: "No. 556. U. S. circuit court of appeals, 8th circuit. N. P. R. R. Co. *vs.* Patrick R. Smith. Affidavit of J. H. Mitchell, Jr., for stay of mandate. C. W. Bunn and J. H. Mitchell, Jr. Filed October 18, 1895. John D. Jordan, clerk."

77 And on the eighteenth day of October, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order staying the mandate in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

FRIDAY, *October* 18, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error. } No. 556.

In error to the circuit court of the United States for the district of North Dakota.

Upon application of counsel for plaintiff in error, and for good cause shown, it is hereby ordered that the sending down of the mandate in the above-entitled action from this court to the U. S. circuit court for the district of North Dakota be, and the same is hereby, stayed to and including the 28th day of October, A. D. 1895.

And on the nineteenth day of October, A. D. 1895, a motion to make receivers parties plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error.

Now come C. W. Bunn and J. H. Mitchell, Jr., counsel for the plaintiff in error in the above-entitled cause, suggesting to the
78 court the fact of the appointment of E. H. McHenry and F. G. Bigelow as receivers of said plaintiff in error as made since the rendition of the judgment of affirmance in said cause in this court and prior hereto by the circuit courts of all the districts in said eighth circuit in which any property of said plaintiff in error is situated, and moves the court for an order joining said E. H. McHenry and F. G. Bigelow, receivers of the Northern Pacific Railroad Company, with the Northern Pacific Railroad Company, as parties plaintiffs in error in the above-entitled cause in this court, and for an order amending the record of said cause in this court, so that the same shall show the said E. H. McHenry and F. G. Bigelow as receivers of the Northern Pacific Railroad Company to be parties plaintiffs in error conjointly with said Northern Pacific Railroad Company.

C. W. BUNN,
J. H. MITCHELL, JR.,
Counsel for Plaintiff in Error.

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error.

Now, on this 19th day of October, 1895, upon motion of C. W. Bunn and J. H. Mitchell, Jr., counsel for plaintiff in error in this cause, it is hereby ordered that E. H. McHenry and F. G. Bigelow, receivers of the Northern Pacific Railroad Company, be, and hereby are, joined with the Northern Pacific Railroad Company as parties plaintiff- in error in the above-entitled cause in this court, and that the record of said cause in this court be, and hereby is, amended so that the said E. H. McHenry and F. G. Bigelow, as receivers of the Northern Pacific Railroad Company, shall appear therein as
79 parties plaintiff- in error conjointly with said Northern Pacific Railroad Company.

Endorsed: "No. 556. U. S. circuit court of appeals, eighth circuit. N. P. R. R. Co. *vs.* Patrick R. Smith. Motion for order adding receivers as parties plaintiff- in error. C. W. Bunn and J. H. Mitchell, Jr., att'ys for defendant, St. Paul, Minn. Filed October 19, 1895. John D. Jordan, clerk."

And on the nineteenth day of October, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order making receivers parties plaintiffs in error in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

SATURDAY, *October* 19, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
PATRICK R. SMITH, Defendant in Error. } No. 556.

In error to the circuit court of the United States for the district of North Dakota.

This cause came on this day to be heard upon the motion of counsel for plaintiff in error to make additional parties herein, and it appearing to the court that E. H. McHenry and F. G. Bigelow have been appointed as receivers of the said Northern Pacific Railroad Company, it is now here ordered by this court that said E. H. McHenry and F. G. Bigelow, receivers, be, and they are hereby, made parties plaintiffs in error in this cause.

And on the fifteenth day of November, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond on writ of error in words and figures following, to wit:

80 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, E. H. McHENRY and F. G. Bigelow, Receivers of the Northern Pacific Railroad Company, Plaintiff- in Error,

vs.

PATRICK R. SMITH, Defendant in Error.

Know all men by these presents that we, said Northern Pacific Railroad Company, a corporation created by and existing under an act of Congress of the United States of America entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," approved July 2, 1864, and E. H. McHenry and F. G. Bigelow, receivers of said Northern Pacific Railroad Company, the above-named plaintiffs in error, by J. H. Mitchell, Jr., their counsel, as principal-, and the American Surety Company of New York, a corporation duly organized and incorporated under the laws of the State of New York and authorized to do business in the State of Minnesota, as surety, are held and firmly bound unto the above-named Patrick R. Smith in the sum of fifty thousand ($50,000.00) dollars, lawful money of the United States of America, to be paid to the said Patrick R. Smith, his executors, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, and the successors and assigns of said company, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas the above-named Northern Pacific Railroad Company and the said E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, have prosecuted a writ of error in the Supreme Court of the United States to the circuit court of appeals for the eighth circuit to reverse the judgment
81 rendered by said United States circuit court of appeals herein under date of August 19th, 1895, affirming the judgment of the circuit court of the United States for the district of North Dakota rendered under date of March 16th, 1894, in favor of said above-named Patrick R. Smith and against the said Northern Pacific Railroad Company:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company and the said E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their

plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By J. H. MITCHELL, JR., *Its Counsel.*

Signed in presence of—
J. G. DRESEN.

E. H. McHENRY AND
F. G. BIGELOW,
As Receivers of the Northern Pacific Railroad Company,
By J. H. MITCHELL, JR., *Their Counsel.*

Signed in presence of—
J. G. DRESEN.

E. H. McHENRY AND
F. G. BIGELOW,
Receivers of the Northern Pacific Railroad Company,
By E. H. McHENRY.

Signed in presence of—
J. G. DRESEN.

AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By DANIEL D. MERRILL,
Resident Vice-President.
GEORGE B. EDGERTON,
Resident Assistant Secretary.

Signed in presence of—
A. M. WICKWIRE.
G. P. O'NEALL.

82 The sufficiency of the surety of this bond approved this 19th day of October, 1895.
(Signed) WALTER H. SANBORN,
Circuit Judge, 8th Circuit.

Approved as a supersedeas this 23rd Oct., 1895.
(Signed) DAVID J. BREWER,
Justice Supreme Ct.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it remembered that on the 19th day of October, A. D. 1895, before me personally appeared Daniel D. Merrill and George B. Edgerton, to me personally known, who, being by me severally sworn, say—the said Daniel D. Merrill says that he is the resident vice-president of the American Surety Company of New York, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said George B. Edgerton says that he is the resident assistant secretary of said company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Daniel D. Merrill and the said George B. Edgerton each acknowledge the said instrument to be the free act and deed of said corporation.

[SEAL.]

A. M. WICKWIRE,
Notary Public, Ramsey County, Minn.

Endorsed: "U. S. circuit court of appeals, eighth circuit. N. P. R. R. Co., E. H. McHenry & F. G. Bigelow, rec'rs N. P. R. R. Co., pl'ffs in error, *vs.* Patrick R. Smith, def't in error. Supersedeas bond. C. W. Bunn and J. H. Mitchell, Jr., attorneys for pl'ffs in error. Filed Nov. 15, 1895. John D. Jordan, clerk."

83 And on the fifteenth day of November, A. D. 1895, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company and E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, plaintiffs in error, and Patrick R. Smith, defendant in error, a manifest error hath happened, to the great damage of the plaintiffs in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 23d day of October, in the year of our
85 Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of U. S. Supreme Court.

Allowed by—
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said court, at office in the city of St. Louis, Missouri, this sixteenth day of November, A. D. 1895.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

—— ——, being duly sworn, says that he is an officer, to wit, —, of the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 189–.

—— ——,
Notary Public, Ramsey County, Minn.

[Endorsed:] C. U. S. circuit court of appeals, eighth circuit. Northern Pacific Railroad Company, Edwin H. McHenry, Frank G. Bigelow, receivers Northern Pacific Railroad Company, pl'ffs in error, *vs.* Patrick R. Smith, def't in error. Writ of error. C. W. Bunn and J. H. Mitchell, Jr., attorneys for defendant, St. Paul, Minn. Filed Nov. 15, 1895. John D. Jordan, clerk.

86 And on the fifteenth day of November, A. D. 1895, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned:

87 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, E. H. MCHENRY and F. G. Bigelow, Receivers of the Northern Pacific Railroad Company, Plaintiffs in Error,

vs.

PATRICK R. SMITH, Defendant in Error.

To Patrick R. Smith, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, next, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company and E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23rd day of October, A. D. 1895.

DAVID J. BREWER,
Associate Justice Supreme Court.

[Endorsed:] C. Original. U. S. C. C. appeals, 8th circuit. N. P. R. R. Co., E. H. McHenry & F. G. Bigelow, rec'rs N. P. R. R. Co., pl'ffs in error, *vs.* Patrick R. Smith, def't in error. Citation. Due service of copy of within admitted this 26th day of October, A. D. 1895. Stevens, O'Brien, Cole & Albrecht, attorneys for defendant in error. Oct. 28. Filed Nov. 15, 1895. John D. Jordan, clerk.

88 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing eighty-seven pages contain a true transcript of the record, as printed by stipulation of the parties, upon which the case was heard in this court, and true and complete copies of all the proceedings and record entries, including the opinion of said circuit court of appeals, in the case of E. H. McHenry and F. G. Bigelow, receivers of the Northern Pacific Railroad Company, and Northern Pacific Railroad Company, plaintiffs in error, *vs.* Patrick R. Smith, defendant in error, No. 556, May term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

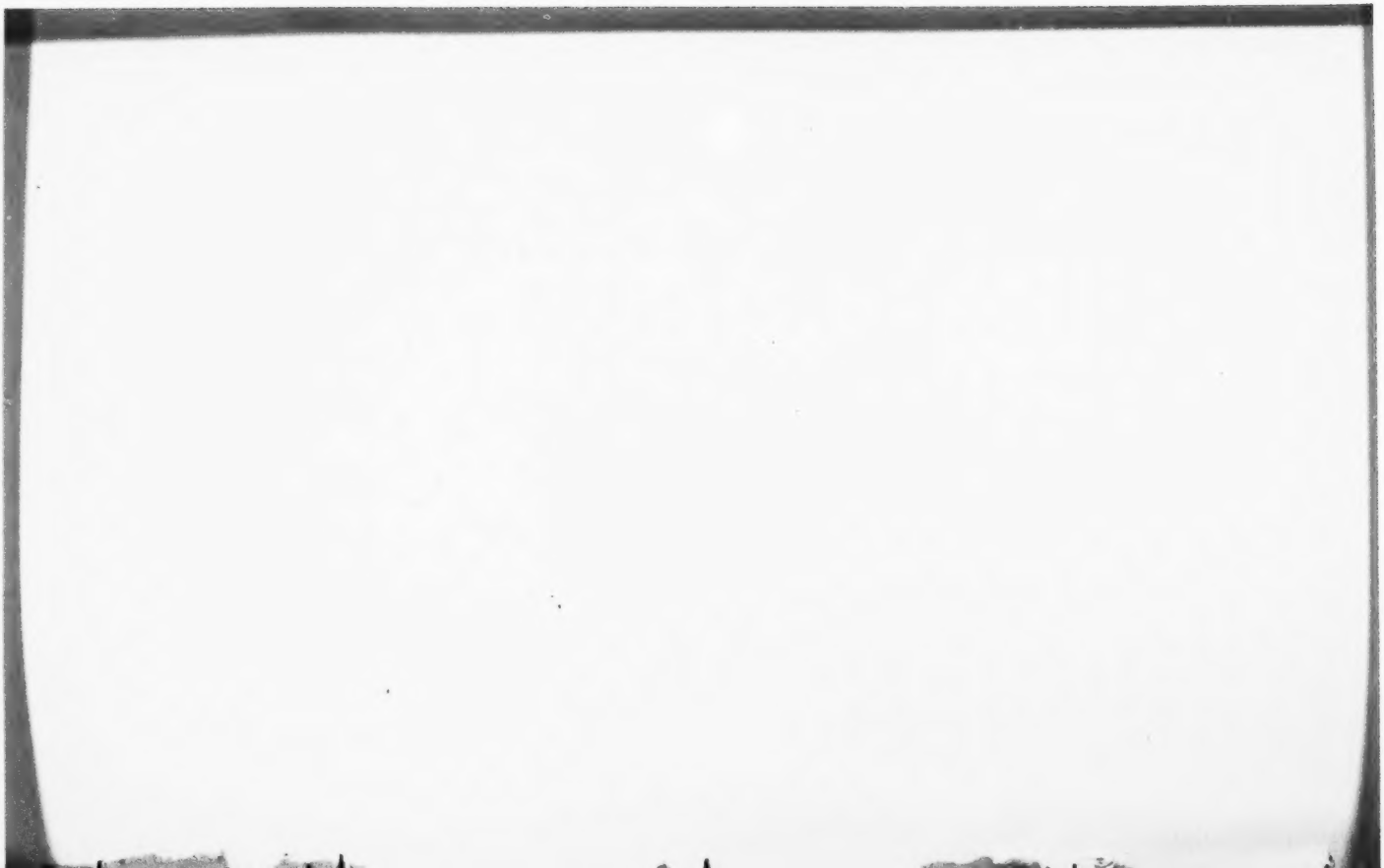
I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this sixteenth day of November, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 16,121. U. S. circuit court of appeals, eighth circuit. Term No., 391. The Northern Pacific Railroad Company *et al.*, plaintiffs in error, *vs.* Patrick R. Smith. Filed December 31, 1895.



No. 93.
Brief of Bunn for P. E.
Filed Oct. 22, 1897.

OCT 22 1897
JAMES H. MCKENNEY,
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 93

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PLAINTIFFS IN ERROR

C. W. BUNN,
Counsel for Plaintiff in Error.

ABBOTT PRINTING COMPANY, BOOK AND JOB PRINTERS.
91-94 UNION BLOCK, ST. PAUL.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 93

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

ERROR OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF FACTS.

This is a writ of error to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment determining that Patrick R. Smith (plaintiff in the Circuit Court) is entitled to possession of the lands in controversy and to recover from plaintiffs in error the sum of $30,024.21 damages for withholding said property.

The action is brought by Smith in the Circuit Court of the United States for North Dakota. The property in dispute is described in the complaint as lots 5, 6, 7, 8, 9, 10, 11 and 12, block 8, according to the plat of Bismarck, North Dakota. In fact, it is, and has been since the construction of the Northern Pacific Railroad, occupied by the main and yard tracks of that road in Bismarck, and all lies within 200 feet of the center line of the main track.

The Railroad Company in its answer alleged lawful possession and title under the charter of the company (Act of Congress July 2, 1864). The answer pleads also a general denial and former adjudication in favor of the Railroad Company in the courts of the Territory of Dakota: (Transcript, p. 5).

The Circuit Court on a former trial rendered judgment on the merits against the plaintiff, which was reversed by the Circuit Court of Appeals: *Smith* vs. *Northern Pacific R. R. Co.*, 58 Fed. Rep. 513, 7 C. C. A. 397. On the second trial the judgment was rendered which is here for review; it was affirmed by the Circuit Court of Appeals, 69 Fed. Rep. 579: (Transcript, p. 60).

The case at the Circuit was tried by the court, a jury being waived. The court's findings are at pp. 15–17 of the Transcript. A bill of exceptions was settled and is printed at pp. 20–46 of the Transcript. The findings show this state of facts:

The plat of Bismarck was formerly known as Edwinton, its name having been changed by act of the legislature. The property in dispute was part of an 80 acre tract entered by John McLean as mayor of the city of Bismarck on behalf of its inhabitants under the Townsite Act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21, 1879: (Transcript, p. 15). The corporate authorities subsequently conveyed to the defendant in error: (Transcript, p. 15).

The court further finds that this 80 acre tract was selected as the location of a portion of the townsite prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior & Puget Sound Land Company (which company made such selection) sold lots upon this townsite according to a plat which was afterward, February 9, 1874, recorded with the Register of Deeds of the County. By January, 1873, thirty buildings had been erected on the townsite, and from that time to 1879, when patent issued, the population continued to increase. It was upon the townsite *thus* selected and the plat *thus* made, which was afterward adopted as the site of the City of Bismarck, that the patent to McLean was based. The pat-

ent contained no reservation of any right of way for the Railroad Company: (Transcript, p. 16).

Note that no selection or entry was made by the TOWN *authorities, and no proceedings instituted in the land office (so far as the record shows), prior to patent July 21, 1879.*

The public survey of the township containing the 80 acre tract was made in October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

The foregoing is the title of the Defendant in Error. That of the Northern Pacific Railroad Company is as follows:

The company claims under the act of July 2, 1864, creating the corporation, sec. 2 of which act grants to the company a right of way 200 feet on each side of the *railroad* where *it* (the railroad) may pass through the public domain. On February 21, 1872, the company filed in the Interior Department its map of general route east of the Missouri river. This route passed about three-quarters of a mile south of the said 80 acre tract. May 26, 1873, it filed its map of definite location, which was accepted by the Commissioners of the General Land Office. The line of definite location, according to this map, passed about two miles south of the land in dispute. During 1872 some grading was done on the map line. During 1872 the company staked out a line across the property in question substantially where the track was afterwards built. This line was graded in 1873, and in June, 1873, the track laid where it has ever since been. The grading on the map line two miles south was abandoned. The property is within two hundred feet of the main track as constructed: (Transcript, p. 16, 21).

As to former adjudication the facts found by the court are: In the year 1877 the Railroad Company commenced an action in the District Court of Burleigh County, Territory of Dakota, in which county the premises were situated, against Patrick R. Smith, defendant in error here, and others, to recover possession of part of the premises in question, Smith being then in possession. The court had jurisdiction of the parties and sub-

ject matter, and the Railroad Company recovered a judgment against Smith for the possession of said premises, and nominal damages for withholding the same: (Transcript, pp. 16, 17).

The complaint of the Company in the former action alleged "that the Northern Pacific Railroad Company is a corporation created by and exists under an act of the Congress of the United States entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' approved July 2, 1864. * * * * That in May, 1873, plaintiff became seized in fee for the use and purpose of a right of way to the following premises." Smith was alleged to be in actual and wrongful possession. He demurred to the complaint. The demurrer was overruled, and judgment thereupon rendered for the company to the effect before stated: (Transcript, pp. 12–15).

It is agreed in the record that the value of the use of the whole premises here in question was $26,000, and omitting that part thereof described in the complaint in the former action, $21,000: (Transcript, p. 10). The plaintiff's recovery below was for $26,000 and interest, and for possession of the whole property. The former adjudication was held to be no bar either in whole or part to this action. A finding dividing the damages was requested, denied and exception taken: (Transcript, pp. 43–45).

Upon the trial plaintiff in error offered in evidence the complaint in said former action to show that the plaintiff in error there claimed the land as its right of way under the act of 1864, and recovered it in the former action upon that ground. This evidence was excluded by the court and the plaintiff in error excepted: (Transcript, p. 35).

Upon the trial plaintiff in error offered to prove that after its road had been constructed over and beyond the premises in dispute, commissioners were duly appointed by the President of the United States under the provisions of sec. 4 of its charter, to examine and report

thereon; that they performed their duty and transmitted their report to the secretary of the interior, by whom it was forwarded to the President November 28, 1873; that this report was approved by the president December 1, 1873; that the report referred to contained an exact statement of the location of the constructed line of plaintiff in error, and an approval thereof. This offer was rejected and plaintiff in error excepted: (Transcript, pp. 22–30).

The plaintiff in error offered in evidence on the trial depositions of two civil engineers, Charles A. F. Morris and Montgomery Meigs. These depositions are in the record, and they tend to show that lines of definite location on maps are not necessarily or usually the exact lines of construction. That actual construction deviated in this case, and customarily does on all roads, from the map of location for good engineering reasons; that difficulties always develop and economies become apparent upon construction, which cannot reasonably be foreseen at the time of location. These depositions were excluded by the court and plaintiff in error excepted: (Transcript, pp. 31–41).

It will be noted that all the maps and public documents referred to in the findings, stipulations and bill of exceptions (or copies thereof) are made part of the record and may be used, read or referred to by either party and considered by the court: (Transcript, pp. 45–46).

The material parts of the act of July 2, 1864, are sec. 2 and sec. 3 which are as follows:

> SEC. 2. AND BE IT FURTHER ENACTED, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said Corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof; said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for sta-

tion buildings, workshops, depots, machine shops, switches, sidetracks, turn-tables, and water stations, and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of this act, and acquired in the donation to the (road) named in this bill.

SEC. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the "Northern Pacific Railroad Company" its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitons of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, That the railroad company receiving

the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word "mineral," where it occurs in this act, shall not be held to include iron and coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said "Northern Pacific Railroad."

ASSIGNMENT OF ERRORS.

The Plaintiffs in Error assign upon this record, and will rely upon, the following errors:

1. The courts below erred in ruling and holding that the Northern Pacific Railroad Company did not have title to the land in controversy as part of its right of way under sec. 2 of the act of July 2, 1864.

2. The courts below erred in ruling and holding that the defendant in error did have title to the land in controversy under the patent to McLean of July 21, 1879, and the subsequent conveyance under said patent to defendant in error.

3. The courts below erred in ruling and holding that defendant in error had any title or right to the possession of said premises.

4. The courts below erred in ruling and holding that said former judgment was not a bar to this action, and in excluding from evidence the record in said former action.

5. The courts below erred in ruling and holding that said former judgment was no bar, at least as to that part of the premises involved directly in the former action and as to $5,000.00 and interest of the judgment for damages awarded.

6. The courts below erred in excluding from evidence the testimony showing the acceptance by Commissioners and by the President of the constructed line under the act of July 2, 1864.

7. The courts below erred in excluding from evidence the deposition of Mr. Morris and Mr. Meigs.

ARGUMENT.

QUESTION OF TITLE.

The right of way granted to the Pacific roads was a vital part of the aid granted them by Congress. The country through which the Northern Pacific was projected to run was public land inhabited largely by unfriendly tribes of Indians. The road was to cross vast regions, passing for a thousand miles through what was called the Great American Desert, crossing three ranges of mountains, the waters of the Mississippi, Missouri, Yellowstone, Clark's Fork and Columbia. The military necessities of the government were one of the prime reasons for its construction. The great undertaking would have been absolutely out of the question without the congressional grant of a right of way. The right of way was of more vital necessity than the land grant. These observations have the approval of this court expressed in *Railroad Company* vs. *Baldwin*, 103 U. S. 426.

Sec. 2 of the act of July 2, 1864, not inferentially or by construction, but, as we think, in the plainest and most explicit terms, grants to the Northern Pacific Company the property here in dispute. Note the express and clear language of sec. 2 and contrast it with the language used by Congress in sec. 3. Sec. 2 grants the right of way. Sec. 3 relates entirely to the odd sections of public land granted by Congress to aid the enterprise. The two sections relate entirely to different things and have no connection with or dependence upon each other. The grant in sec. 2 is unconditional, and would take effect without the company complying with the conditions of sec. 3.

Sec. 2 says:

> "Said way is granted to said railroad to the extent of two hundred feet in width on each side of *said railroad* where *it* may pass through the public domain."

This grant is plain, unambiguous and unconditional. There is no reference in this section to the company filing any map of location. No condition attaches to the right of way grant except those necessarily implied, such as that the road shall be constructed and used for the purposes designated, and built upon the general route defined in the act of congress, namely: from Lake Superior to Puget Sound, by the Northern Route. What is granted is therefore two hundred feet on each side of the railroad itself where the railroad may pass (that is, where it may be actually constructed) through the public domain. It is the construction of the road itself which defines the right of way. The map spoken of in sec. 3 has absolutely no connection with or relation to the right of way, and was required only for the use of the General Land Office in connection with the disposal of the public domain. Had the company built its road it would have become entitled to the right of way granted under sec. 2; it might have failed entirely to file any map of location and so forfeited its land grant under sec. 3, but such failure would not have forfeited the right of way. The map referred to in sec. 3 is not a condition of the attachment of the grant of right of way, and has no relation to it or effect upon it.

The foregoing views are distinctly held in *Central Pacific Railroad Company* vs. *Dyer*, 1 Saw. 641, where the opinion was delivered by Mr. Justice Field, sitting at the Circuit with the District Judge. In that case a bill was filed by the Central Pacific road against parties who claimed title to the right of way of the road by virtue of purchases from the United States after the Central Pacific grant and before the company had filed its map of location. It was argued that the grant of right of way was subject to the same limitation which was prescribed by the act in regard to the land grant, namely, that what

the United States might reserve, sell or otherwise dispose of before the map of definite location was filed was excepted from the company's grant. But the court said:

> "The construction for which the defendants thus contend is clearly incorrect. The grant of the right of way is a present grant operating immediately upon the passage of the act without reservation or exception, and is subject to no conditions except those which are subsequent, or necessarily implied, such as that the road shall be constructed within the period specified, and be afterward maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section apply only to the grants of land therein mentioned, and do not apply to the grant of the right of way made in the second section.
>
> "The provision of the seventh section, requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the Department of the Interior, in no respect affected the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private entry and sale."

Contrast the language of sec. 2 with that of sec. 3. Sec. 3 grants twenty alternate sections per mile on each side of the RAILROAD LINE AS THE COMPANY MAY ADOPT, whenever the United States has full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claim, or rights AT THE TIME THE LINE OF SAID ROAD IS DEFINITELY FIXED AND A PLAT THEREOF FILED IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE. It also provides that whenever lands have been granted, sold, reserved, occupied, pre-empted or otherwise disposed of before the map of definite location is fixed, the company is granted other lands in lieu thereof, so as to make up the full quantity intended to be conferred by congress. By sec. 6 the President was to cause the granted lands to be surveyed

forty miles in width on each side of the road after the general route should be fixed. Maps were required to be filed in order that the government might know what to survey, and that the General Land Office might be able to adjust the railroad grant of alternate sections and determine what lands were patentable to settlers.

But the government had no survey to make in order to determine the right of way. The General Land Office had no duty to perform with respect to the right of way. The matter was not material to settlers and the right of way was not provided to be patented to the company. It has always been the practice of the land department to patent lands without condition to settlers, although they were subject to a right of way grant made prior thereto by congress.

We think these principles were decided by this court in *Railroad Company* vs. *Baldwin*, 103 U. S. 426. Baldwin claimed certain land in Nebraska under a title from the United States acquired in October, 1869. The company claimed a right of way under its grant of July 23, 1866, but did not locate its road over this land until October, 1871. This court decided in favor of the congressional grant, holding that the definite location by map thereof required in that part of the act granting alternate sections was not a condition of the right of way grant taking effect; that the grant of right of way was a present unconditional grant, a float finally attaching and becoming fixed upon and according to the actual construction of the road.

The court by Mr. Justice Field said in that case:

> "The act of Congress of July 23, 1866, c. 212, makes two distinct grants: one of lands to the state of Kansas for the benefit of the St. Joseph and Denver City Railroad Company in the construction of a railroad from Elwood in that state to its junction with the Union Pacific *via* Maryville; the other of a right of way directly to the company itself. The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. The grant of them was subject to the condition that if, at the time the line of the road was definitely fixed, the United States had

sold any section or a part thereof, or the right of pre-emption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated, which should be held by the state for the same purposes. The limitations upon the grant are similar to those found in numerous other grants of land made by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the meantime any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption, and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired. The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in præsenti*. The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this court to similar language in other acts of congress. *Missouri, Kansas & Texas Railway Co.* vs. *Kansas Pacific Railway Co.*, 97 U. S. 491; *Leavenworth, Lawrence & Galveston Railroad Co.* vs. *United States*, 92 Id. 733.

"But the grant of the right of way by the sixth

section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

"We see no reason therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

Se also in support of our argument, *Hamilton* vs. *Ry. Co.*, 2 Idaho 898; *Railway Company* vs. *Douglas Co.*, 31 Fed. Rep. 540, by Mr. Justice Brewer; *Bybee* vs. *Ry. Co.*, 26 Fed. Rep. 586; *Doran and Wilson* vs. *R. Co.*, 24 Cal. 246.

It should be a matter of common knowledge of which this court will take notice, and it is also a matter which the plaintiffs in error offered to prove by testimony on the trial, that when it comes to the actual building of a railroad, engineering difficulties make themselves apparent and economies are shown to be possible, which could not be reasonably foreseen and determined when the location was made. This being true, no land grant road has been constructed for any considerable distance, especially in regions full of engineering difficulties and comparatively unknown, without changes in the constructed line from the map line. Location without construction would give the company no title to right of way. It results, if the decision below is correct, that in such places a railroad company has no title on either its located line or constructed line. Congress must have appreciated that alterations of route were frequently necessary upon construction, and it could not have been the intent of Congress that its purpose to grant right of way should be wholly defeated by such alterations of route.

Moreover, there has probably never been a map filed with the Interior Department locating any land grant road, which was drawn on sufficiently large a scale and with sufficient accuracy of detail, so that the land department could *exactly* locate the right of way from such map. And there is no reason why the land department should be able to locate the right of way, for, as we have before said, it is not the practice of the land department to make an exception or reservation of rights of way in its patents to purchasers. The land department has never required maps to be filed for the purpose of defining a land grant to be sufficiently accurate so that the department could also therefrom define the right of way. And if the decision below is to stand, it affords good ground for a controversy between every land grant road and every land owner along its line as to the boundary between them. The policy of the law should be to make such controversies impossible, and this can only be accomplished by holding that the laying down of the rails defines the boundary.

It has been held that a company may change its map line under general act of 1875 Kan Pac R. v. N C

The case of *Missouri, Kansas and Texas Railway Company* vs. *Cook*, 163 U. S. 491, was not argued orally in this court, and in view of the prime and wide importance of this question we feel warranted in urging a further consideration, more especially inasmuch as it seems to us the Cook case overrules the Baldwin case, while, judging from the opinion, it was the intention of the court to re-affirm and follow the Baldwin case. The learned Chief Justice says, in the Cook case, p. 496: "That by the filing of the map the route was definitely fixed within the intent and meaning of the act." So far there can be no dispute, our whole point lying in the proposition that definitely fixing the route has nothing to do with fixing the right of way. The opinion then continues to say: "And while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way." But we ask why such map filing cannot otherwise than operate to locate the right of way? The map was for the department. The department had nothing to do with surveying or staking off the right of way. It was no part of its duty to establish that boundary as between the company and adjoining settlers; it did not reserve right of way in its patent; it did not care where the right of way ran; its duties consisted in defining the odd sections which came to the company's grant, fixing the losses and selecting the indemnities therefor. Again, on page 497, the opinion in the Cook case, after citing authorities in this court, which establish the admitted rule that a change in route adopted by the railroad company does not change the alternate sections covered by the grant, does not shift the grant laterally, says: "The same conclusion necessarily followed in respect of the right of way." We ask, why necessarily followed? The reasons why the land grant should not be shifted from one section to another are plain. Settlers had to be protected. But, as this court said in the Baldwin case, the same reasons do not apply to the grant of the right of way. It is not disputed, as the opinion in the Cook case

holds, that both grants were grants *in præsenti*, but one was a grant free of conditions, the other a grant on conditions. The right of way was granted absolutely, and according to the plain terms of sec. 2 would attach to any public land owned by the United States at the date of the act, without the company filing any map, and as against purchasers from the United States after the passage of the act, while, on the other hand, sec. 3 lays on the grant of alternate sections the express condition that a map shall be filed, and says that the grant shall attach according to such map. And as said in the authorities we rely upon, the policy of congress to settle the country required the filing of a map to designate to the department the alternate sections granted, while there was no policy of congress which required the department to be advised of the exact limits of the right of way.

The whole matter could not be better summed up than in the language of this court in the Baldwin case in speaking of the condition or qualification of sec. 3 as to filing a map.

> "Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

But if the case of *Missouri, Kansas and Texas Railway* vs. *Cook* is an authority to be followed, it is still not controlling of this case. The stipulation of facts in that case contained this clause: "But the route of said road on its present location has never been approved by the President of the United States unless such approval is shown by the other facts herein admitted." There were no facts stated in the stipulation which showed any action by the President approving the constructed line.

Sec. 4 of the Northern Pacific act provides that whenever twenty-five consecutive miles of any portion of the road is ready for service, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that said road has been completed in good, substantial and workmanlike manner, and

in all other respects as required by the act, the commissioners shall so report to the President and patents shall be issued to the company. The stipulation and evidence offered by the plaintiffs in error (which were excluded by the court on the trial and an exception taken) show that the road having been completed, commissioners were appointed under the act and reported November 24, 1873, that the road had been properly located under the act and properly built. November 28, 1873, the Secretary recommended the acceptance of this report. The recommendation was approved by President Grant December 1, 1873. The land on which the road was built was public land at this time. It is now settled that mere occupation without the filing of any claim in the land office does not attach any private rights to the land as against the United States. *Northern Pacific Railroad Company* vs. *Colburn*, 164 U. S. 383. Therefore the buildings put on some part of this 80 acre tract in 1872 and 1873, and the sale of lots according to a plat by the attorney of the Lake Superior and Puget Sound Land Company did not change the character of the land as public land. The patent under which defendant in error claims, issued in 1879, and the entry in the land office on which that patent was based was made September 14, 1876.

This executive action in 1873 constituted an acceptance of the constructed line by the United States in satisfaction and performance of the requirements of the company's charter. This acceptance should be held to estop the United States and its subsequent grantees to deny that the constructed line is the line intended by Congress, and therefore to deny that the land in dispute is subject to the right of way of the plaintiff in error. On the other hand, in *Missouri, Kansas and Texas Railway* vs. *Cook*, the land in question was purchased of the United States October 9, 1867 and a certificate in due form on that day issued to the purchaser upon which a patent followed November 1, 1870. Prior to the 24th of December, 1867 the company in that case had surveyed a different route which did not touch the quarter section in question, and after the purchase from the United States the company

made a re-location between May 1, 1870 and June 6, 1870, and built its road on the new line. In that case there was therefore an existing established line not touching the land at the time the purchaser made entry, which might in some degree operate to estop the company from afterwards changing its line to the disadvantage of such purchaser. But here the road was built on the ground where it now is and the right of way was in the possession of the company, trains had been running over it for many years before the entry was made and patent issued under which defendant in error claims. Defendant in error took his title from the company's grantor with full notice by the company's open possession ~~and~~ of its claims.

FORMER ADJUDICATION.

We submit that the former judgment is a bar and estops defendant in error from maintaining this action. In 1877, before Mr. Smith received his deed from the corporate authorities of the city of Bismarck, he was in the possession of a part of the premises in question and the company obtained a judgment for recovery of possession and for damages in an action against him. The learned Circuit Court of Appeals decided that this judgment was not a bar because defendant in error relies in this case on a title subsequently acquired. But let us examine the correctness of that conclusion. We do not question the general doctrine that ejectment is not a bar as to subsequently acquired title. But that doctrine has its limitations and has no application to this case. Confessedly plaintiff in ejectment being defeated may buy another title and sue again. Probably it is also true that in many cases, perhaps in ordinary cases, defendant in the first ejectment may buy in a hostile title and prove it in another action. The authorities cited in the opinion of the Circuit Court of Appeals go no further than this. But this case is quite different. In ejectment the plaintiff's pleading is customarily general, simply alleging title in himself, but the plaintiff may at his election set forth his

chain or source of title. And it is elementary that the pleadings and whole record in an action may be introduced in another action to show exactly what question or issue was decided in the first.

Here the railroad company in the former action, as it had a right, made a specific allegation in its complaint that it was the corporation created under the act of July 2, 1864, and that the premises in question were by that act granted to it by the United States as part of its right of way. Now, the defendant in that action (Smith) being in possession, did not need any title of his own to defeat the plaintiff. It is elementary that the plaintiff had to recover in that action on the strength of its own title, not on the weakness of the defendant's title. Therefore, when Smith demurred to the complaint the issue was squarely made between him and the railroad company, whether the United States had made a valid grant of right of way to the company covering this land by virtue of the act of Congress. This issue was adjudicated in favor of the company and is precisely the issue which defendant in error seeks to bring again into litigation in this action.

The case would be entirely different if the complaint in the former action had been in general terms only, to the effect that the company owned the land. For then the judgment would not show what issue was determined and it might be open to Smith to rely here on an after-acquired title. In this case both parties claim under the same source of title—from a common grantor. Both admit that the land belonged to the United States on July 2, 1864. If the United States on that day made a valid conveyance to the company, no question or issue remains as to the effect of its patent to McLean. That patent was void if the conveyance to the company was good. So the issue in this case narrows down to this; whether the United States conveyed this land to the railroad company by the act of 1864. This specific issue was determined in favor of the company as between it and Smith in the former action, and on the plainest principles the former judgment must be held a bar.

To illustrate, suppose A sues B in ejectment, A setting forth in his declaration that C being the owner of the land at a certain time, made on a day named, a valid conveyance to the plaintiff. Issue is joined upon the scope and validity of C's conveyance to A, and it is adjudged that such conveyance is good, and passed to A a title to the property, or at least what interest C had. After this judgment B obtains and takes to himself a second conveyance from C, confessedly covering the same interest and title which C had at the date of the former conveyance, and on this new title he sues A in a second ejectment. It will not do for B to rely on the proposition that the former judgment is not a bar as to his subseqently acquired title. He has bought from the same grantor the same title which A claims to have bought previously. A has a perfect answer to his ejectment in the fact that the former action adjudicated that C's title passed to him by the prior conveyance. In the case at bar, if the United States conveyed to the company it had nothing left to convey to McLean. That it did convey to the company was adjudicated as between Smith and the company in the former action. Smith, now relying on a subsequent conveyance of the same title and interest from the same grantor, cannot recover without impeaching the fact decided by the former litigation, to-wit: that the United States conveyed this land to the railroad company July 2, 1864. It is not a case of after acquirement of a new title; but attempted acquirement of the very title adjudicated to be in the railroad company by the first judgment.

It is fundamental that a former judgment between the same parties is conclusive upon every question of fact directly involved under the issues in the former action and shown to have been actually litigated and determined therein. The estoppel of a judgment, while not extending to points not in issue, does cover every point which is in issue. And if the company's title—the same title which it now asserts—was the issue in the former action the former judgment is a bar. The case comes plainly within the principle so often decided by this

court, that where the second action between the same parties is upon a different claim or demand, judgment in a prior action is an estoppel as to matters in issue or points controverted upon which the former decision was rendered. *Bryan* vs. *Kennett*, 113 U. S. 179; *Cromwell* vs. *Sac County*, 94 U. S. 351; *Davis* vs. *Brown*, 94 U. S. 423; *Hornbuckle* vs. *Stafford*, 111 U. S. 389; *Chapman* vs. *Smith*, 16 How. 114; *Packet Co.* vs. *Sickles*, 5 Wall. 580; *Miles* vs. *Caldwell*, 2 Wall. 35; *Keokuk & W. Ry. Co.* vs. *Missouri*, 152 U. S. 301; *Nesbit* vs. *Riverside Independent Dist.*, 144 U. S. 610; *Wilmington & W. R. R. Co.* vs. *Alsbrook*, 146 U. S. 279. See also *2 Smith's Lead. Cases*, 7th Am. ed., top p. 786.

A question which has been judicially determined cannot be freed from the estoppel by a change in the form of the cause of action. *2 Smith's Lead. Cases*, 7th Am. ed., top p. 764. In order to know what is within the estoppel we must look beyond the former judgment to the demand or allegation of the pleadings, and the judgment precludes the parties from disputing any point or matter of fact which has been once put distinctly in issue. *Outram* vs. *Morewood*, 3 East. 346, decided the principle that recovery upon an issue joined as to title is conclusive as to that title in a subsequent action; that it is the matter alleged and upon which the recovery proceeds which is concluded.

If the former judgment is an estoppel it seems clear that such estoppel extends to the whole property involved in this action, although only a portion of it was directly involved in the former action. The property now in question is one parcel, being a strip of land occupied and claimed by the railway company as its right of way. The tracks not covering the entire right of way, Smith at the time of the institution of the former action was in possession of a part of this entire parcel. The adjudication that the property then sued for was a part of the company's right of way under its grant necessarily involved an adjudication that the whole strip was part of its right of way; for the right of way could not attach as to a twenty-five foot strip and fail to attach as

to the remainder. Smith could not by taking possession consecutively of small pieces of one entire parcel of land compel the company to re-litigate with him as to each piece its title, which attached to the whole if it attached at all. *Aurora City* vs. *West*, 7 Wall. 82; *Beloit* vs. *Morgan*, 7 Wall. 619.

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Counsel for Plaintiff in Error.

Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
PATRICK R. SMITH.

No. 93.

ADDENDA TO BRIEF FOR PLAINTIFF IN ERROR.

Congress has sometimes included a grant of right of way in an act also granting other public lands; in other cases acts have related solely to right of way. But in all cases the grant of right of way has been according to the *road*, or *track*, where it might be built. In acts granting right of way only there was commonly no requirement that a map be filed.

Reference may be made to the following acts concerning right of way solely:

Act of March 3, 1835, Vol. 4 Statutes, p. 778, granting right of way for a railroad from Tallahassee to St. Marks in Florida, "*the land over which the said road shall pass and thirty feet on each side of the same.*" (No location map mentioned.)

An act of March 3, 1873, Vol. 17 Statutes, p. 612, granting right of way in very similar terms for the Utah Northern road, required a map to be filed within one year showing the location of the road.

Act of June 20, 1874, Vol. 18 Statutes, p. 130, granting right of way to the Nevada County Narrow Gauge Railroad Company "fifty feet in width on each side of said railroad *where it may pass* through the public domain." (Location map required.)

Act of June 23, 1874, Vol. 18 Statutes, p. 274, granting right of way to Arkansas Valley Railway Company. (Same language as act last above.)

Act February 5, 1875, Vol. 18 Statutes, p. 306, granting right of way to Oregon Central Pacific Railway Company "one hundred feet wide on each side of the central line of said road." (Map required in terms substantially of general right of way act of 1875.)

No. 93.

Brief of Bunn for P. E.

FEB 1
JAMES H. M

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 93.

Filed Feb. 9, 1898.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS.

Plaintiffs in Error.

vs.

PATRICK R. SMITH.

BRIEF OF PLAINTIFFS IN ERROR ON RE-ARGUMENT.

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NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS.

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BRIEF ON RE-ARGUMENT.

The order made opens the whole case for re-argument. For the most part we shall abstain from repeating what is said in the brief filed on former argument, but at the risk of repetition we wish to call the particular attention of the Court to the facts shown in the record.

The complaint of the plaintiff (Transcript, p. 2) alleged that on the fourteenth day of September, 1876, the plaintiff *became* and ever since has been and still is duly seized in fee simple, etc. *The plaintiff does not claim any title or possession anterior to September 14, 1876.* This action was commenced on the twenty-eighth of December, 1891 (Transcript, pp. 3 and 4).

The answer of the defendant (Transcript, p. 5) alleged, that the land mentioned in the complaint was within two hundred feet of the center line of its railway, and had been for more than twenty years in the defendant's lawful possession as its right of way, roadbed and depot grounds. The plaintiff's reply (Transcript, pp. 6 and 7) denied that the land had been in the possession of the defendant for twenty years, but admitted and

averred, that the southerly half of the premises had been unlawfully used and possessed by the defendant, partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same for purposes connected with shipment and receipt of freight to and from the railroad of said defendant, for a period of eighteen years last past, and that the northerly half of the premises had been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same.

The pleadings therefore admit possession of the defendant for eighteen years before the action was commenced, that is, from December, 1873.

The facts as to possession stipulated by the parties (Transcript, p. 9) are, that during the year 1872 the Railroad Company staked out a line across the eighty-acre tract (of which the premises described in the complaint are a part) substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the month of June, 1873, the Railroad was constructed across this tract, and has since remained and been operated upon it. The lots described in the complaint are within two hundred feet of the main track of defendant's railroad as actually constructed, and have been occupied by the defendant and its tenants during the period in question (*i. e.* since June, 1873), but no part of the same except the rear twenty-five feet thereof has ever been occupied for railroad purposes.

The other part had doubtless been occupied by parties to whom the Railroad Company leased the same for purposes connected with shipment and receipt of freight to and from the railroad.

These facts so stipulated were found by the Court.

It is therefore conclusively shown, that the Railroad Company took possession of the premises in June, 1873, and had been in possession for over eighteen years before this action was brought; that the Railroad Company claimed the land as part of its right of way, that is, as public land of the United States granted to it by Congress by its charter of July 2, 1864.

On the other hand, the title of the defendant in error arises under a patent to John A. McLean, as Mayor of the city of Bismarck, under the townsite act (Rev. Stats., Sec. 2387). This patent was issued July 21, 1879, six years after the Railroad Company had taken possession of the premises in question. It covered eighty acres, of which the premises sued for constitute a small part. There can be no presumption in favor of a plaintiff in ejectment; *there is no proof or suggestion in the record that the plaintiff's title had its inception before the issue of patent, or that it related back of that date*, unless, indeed, it be the allegation in plaintiff's complaint, that he became seized on September 14, 1876. Even the latter date was over three years after the Railroad Company took possession. But if the Court will take notice of the entry which underlies the patent, it will be found by the Land Department records to have been made September 14, 1876. It is significant that this is the very day fixed by plaintiff in his complaint, as the inception and origin of his seisin and title.

It should be distinctly borne in mind that there is not a word in the record which shows, or suggests, *any* possession *of the premises in question* prior to the possession of the Railroad Company. The finding is, that the eighty acre tract on which these lots were situated was selected as the location of a townsite by the Lake Superior and Puget Sound Land Company in 1872, and that by the first of January, 1873, thirty buildings had been erected on the townsite. This does not imply, or suggest, possession by any person of *that part of the eighty acres constituting the premises described in the complaint*, antedating the possession of the Railroad Company. On the contrary, the Railroad Company staked out its line across the eighty acre tract, where it was afterwards built, in 1872, and built its line in June, 1873. No doubt the location by the Railroad Company brought the population. If the railroad had gone two miles south, the townsite and the city of Bismark would have been two miles south. No claim can possibly be made upon the record that the inhabitants of the city of Bismarck, or any one of them,

or the plaintiff, questioned, or contested the right, or the possession, of the Railroad Company when the road was built. *The record shows the Railroad Company to have been the first possessor of that part of the townsite described in the complaint.*

The corporate authorities of the city of Bismarck conveyed the lots sued for to Patrick R. Smith sometime subsequent to the issue of patent, that is, after July 21, 1879. The exact date is not shown in the record. The Railroad Company had therefore been in open, notorious and constant possession of this property, as part of its right of way, yards and depot grounds, for over six years at the least before the plaintiff obtained the deed upon which this ejectment is founded; and many years elapsed after that before this action was commenced.

I.

We will first consider the questions to which the Court in the order for reargument directs special attention of counsel. The first question suggested is this:

> "Could occupants of public lands, before they were surveyed and declared open for settlement, by subsequently availing themselves of the town site act, procure a title paramount to that of a Railroad Company, which, under a previous grant by Congress, had taken possession before the town site patent was granted?"

Preliminary to the discussion, we trust the Court is not under the impression, that the particular land sued for in this case was in the occupation of any person, other than the Railroad Company, at any time prior to June, 1873, when the road was built. As we have pointed out the record does not warrant such a conclusion, or inference.

(*a*) We submit that *Ashby* vs. *Hall*, 119 U. S. 526 is controlling. That was a suit to abate an obstruction in an alley in the city of Helena. The plaintiffs were owners of lots bordering on the alley and claimed it for a right of way. The plaintiffs had been in the pos-

session of their lots at the time of the entry of the town site and the alley was existing at that time, recognized by the inhabitants and used for ingress and egress to and from plaintiff's and other lots. The town site patent ran to the Probate Judge as trustee under the act of Congress and the Judge after deeding to plaintiffs their lots, made a new survey and plat which were approved by the county commissioners, on which the alley was not shown; the Probate Judge deeded it to the defendant, no adverse claim having been presented before him. The decision in the case was, that those who were occupants at the time of the entry had a subsisting and valid right, as beneficiaries under the trust created by the law, of which the Probate Judge was trustee; that his subsequent conveyance to a third person, of property so occupied at the time of the entry, was void and inoperative; that the non-presentation of an adverse claim to defendant's application for a deed was immaterial. The title of Probate Judge or Mayor under the townsite law is, in the language of the act, in trust, "for the several use and benefit of the occupants thereof, according to their respective interests"; the case holds, that a conveyance by the trustee contrary to such right of occupation is in violation of the trust and absolutely null and void.

The case was one of collateral attack upon the conveyance of the Probate Judge, being a suit to abate as a nuisance, a fence erected to enclose the alley by a grantee under the Judge. The Court held such enclosure a trespass.

We submit this case cannot be distinguished. The Railroad Company is shown to have been the occupant of the premises here in question at and before the entry under the townsite law and at all times since. The Mayor's deed to Patrick R. Smith, like the County Judge's deed to the defendant in *Ashby* vs. *Hall*, was null and void. Ejectment cannot be maintained upon it against one who, as occupant, is the beneficiary of the trust vested in the Mayor by the act of Congress.

Therefore, we say, that, supposing for the sake of argument the Railroad Company to have obtained no

title under its right of way grant, it has still the possession and the real title under the townsite patent.

The government survey of this township is stated in the record to have been filed in the General Land Office in March, 1873. Prior to this date, as has been shown, the railroad line was staked out across the land in question, and was completed in June, about three months after the survey was returned. The Court, in the question put to counsel, speaks of occupants of public land before survey, subsequently availing themselves of the townsite act and procuring a title paramount to that of a railroad company, which, under a previous grant of Congress, had taken possession before the townsite patent was granted. We suggest that occupants of the townsite in no event acquire rights beyond their several occupations. The act of Congress says that the mayor, or judge, may enter at the land office "the land so settled and occupied in trust for the several use and benefit of the occupants thereof according to their respective interests." The status of unoccupied property it is not necessary to consider in this case; but as to property occupied when the townsite entry was made, the entry is in trust for the particular occupant, and the community at large, as a community, could not acquire any rights as against such occupation. Neither could any individual in the community.

(*b*) Counsel for the defendant in error, in his brief filed on the former argument, speaks in several places of the right of occupants relating back under the townsite law to a date anterior to the entry, but cites no authority for such proposition except *Ashby* vs. *Hall*. Now, that case involved no such holding. All that it was necessary to decide in that case, and all that was decided, as we understand it, is, that *occupants at the date of entry* had an equitable title by virtue of such occupation. No question was involved in that case of such title relating back beyond the entry, and we know of no authority for saying that it does so relate. Counsel in his brief concedes that homestead and pre-emption titles relate to the date of the filing in the land office. This is doubtless correct, except that the settler is protected for ninety days

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before entry by special provision of statute. No reason can, we think, be suggested why the same rule should not apply to a townsite entry, and why it should not be held that mere occupation before entry confers no rights on the occupant; that the land, in spite of such occupation, retains its character as public land of the United States. The government could have repealed the townsite law before entry; no vested right had attached as against the United States. *Campbell* vs. *Wade*, 132 U. S. 34. See *Buxton* vs. *Traver*, 130 U. S. 232.

As to pre-emption, homestead and other similar claims, the rule on this subject is well settled. As Mr. Justice Miller well said, delivering the opinion of this Court in *Simmons* vs. *Ogle*, 105 U. S. 271, 273:

> "For so common is it for squatters and trespassers to settle on the lands of the United States, and so indulgent are the laws in encouraging such settlements, and so numerous are these settlements without claim of right, and such is the impossibility of resisting or ejecting the settlers, or of efficiently asserting the right of possession by the government, that the weight of the inference in favor of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed."

In the case of *Water and Mining Company* vs. *Bugbey*, 96 U. S. 165, 167, this Court said of the right of a settler:

> "The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the state became absolute as of May 19, 1866, when the surveys were completed."

In *Lansdale* vs. *Daniels*, 100 U. S. 113, 116, this Court said:

> "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." See also *Maddox* vs. *Burnham*, 156 U. S. 544.

The whole subject was recently considered in *Northern Pacific Railroad Company* vs. *Colburn*, 164 U. S. 383, a case where the settler had made no entry at the land

office and afterwards abandoned his settlement. It was held that his occupation without entry conferred no rights and created no claim against the land, which would take it out of a railroad grant that became fixed during the period of such occupation.

Supposing in the case at bar that all the occupants had abandoned their settlements before the townsite entry, would the Court hesitate to hold that the land was ordinary public land, subject to homestead and pre-emption laws, or that it would pass under a railroad grant which became located and fixed during the time of such occupation? The Court we think would find it impossible to distinguish the Colburn case; would find it impossible to distinguish between occupation by fifty people, which might give a right to enter as a townsite, and occupation by one person, which might give a right to enter under the pre-emption law. And if the Colburn case were followed in the case supposed, it would involve a ruling that mere occupation by a community, or number of persons, would no more confer a right to land as against the United States, than would occupation by one person; we fail to discover any good reason why it should.

(c) If, then, the land in question was public land of the United States when the Railroad Company changed its line and took possession, we next submit that the company acquired a perfect title thereto under its right of way grant. This contention, we submit, was decided in the case of *Washington & Idaho R. R. Co.* vs. *Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77.

Section 2 of the Northern Pacific charter makes a present grant to the Railroad Company "to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain." The case last cited arose under the general right of way act of March 3, 1875 (18 Stats., p. 482), which provides "That the right of way through the public lands of the United States is hereby granted to any railroad company * * * to the extent of one hundred feet on each side of the central line of said railroad." Section 4 of the same act provides that a railroad company desiring to

secure the benefits of the act shall, within twelve months after location if upon surveyed lands, and if upon unsurveyed lands within twelve months after survey, file with the land office a profile of its road; and thereafter all lands over which the right of way shall pass shall be disposed of subject thereto.

In the case last cited the Cœur d'Alene Railway and Navigation Company had made three surveys and located upon the ground three lines, two south and one north of the Cœur d'Alene river. A map was filed in the land office under section 4 of the act showing the road to be located on one of the surveys south of the river. But when the company came to construct, it built its line on the survey north of the river, and never filed an amended map. This Court said, p. 97:

> "We agree with the Circuit Court of Appeals in thinking that so far as the United States are concerned there is nothing in the act forbidding a railroad company, having adopted one line of survey along the route provided for in its articles of incorporation, and having filed a plat thereof, to subsequently, and within the time allowed it by law for so doing, adopt another route, and that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened. Such an actual construction and appropriation of one line would preclude the company from asserting any claim to the other lines."

This decision is conclusive, unless the facts involved in that case are essentially different from the facts here. Such facts could be claimed to be different only in two particulars; either because some rights had attached to the land here in question before the road was built, which removed it from the category of public land of the United States, or because the charter of the plaintiff in error is essentially different in this particular from the general right of way act of 1875. We have already endeavored to show, that the land here in question was public land of the United States when the road was built; and the slightest examination of the plaintiff in error's charter will show, that the conclusion, which the

court reached under the act of 1875, would be still more plain and necessary under the charter here involved. For while the act of 1875 (Section 4) provided for filing a map of the right of way in the land office, the charter of the plaintiff in error contained no such provision.

The Court in the C œur d'Alene case adopted, without referring to that fact, the well settled rule of the land office. Two Secretaries of the Interior have ruled under the act of 1875, that section 1 gives the Railroad Company a right of way as specified where its road is actually constructed, and that the company need file no map to secure this right; while Section 4 is construed as not being a condition upon the right conferred by section 1, but as giving an additional right, to-wit: to secure a way, which shall be held and protected for the company, *in advance of construction. St. P., M. & M. Ry. Co.* vs. *Maloney*, 24 L. D. 460; *Dakota Central R. R. Co.* vs. *Downey*, 8 id. 115.

II.

The second question suggested to counsel by the Court can be conveniently considered in connection with the third. The two are as follows:

> 2. "Assuming that the townsite title was, in point of law, prior to that of the Railroad Company, could the City of Bismarck or its grantees maintain an action of ejectment against the Railroad Company?"
>
> 3. "Could Patrick R. Smith, as grantee from the city authorities subsequent to the actual possession by the Railroad Company, maintain either ejectment or an action for the value of the land?"

Assuming that the title of the city of Bismarck was paramount to that of the Railway Company, still the road was built and buildings put upon the land without objection (so far as the record shows) and with the tacit consent of the other occupants of the townsite and of the city authorities. The road had been there many years before the plaintiff bought, and remained there over eighteen years before this action was brought. A time so long, let it be noted, as that any action *for damages for the taking was barred by limitation.*

It is fair to assume a license from, or tacit consent of, the city. Whether the city could revoke that license or consent, and bring ejectment, is probably not necessary to determine. The city has never brought ejectment or claimed damages. The law was stated by this Court in *Roberts* vs. *Northern Pacific R. R. Co.*, 158 U. S. 11, to be: that if an owner of land, seeing a railroad company enter and spend large sums of money in constructing its road, remains inactive and permits the work to go ahead, he cannot afterwards bring ejectment, but is restricted to his action for damages. Numerous cases sustain this proposition besides those cited by the Court in its opinion. See *Kanaga* vs. *Ry. Co.*, 76 Mo. 207; *Dodd* vs. *Ry. Co.*, 108 Mo. 581; *Evansville Ry. Co.* vs. *Nye*, 113 Ind. 223.

As to the right of Mr. Smith, it is well settled he can maintain no action, either of ejectment or for damages. He bought *cum onere;* his rights are subject to the easement established and existing when he bought. The presumption is that he paid only what the land was worth subject to the easement, the claim for compensation or damages remaining in the vendor. This was said to be "well settled" in the opinion of this Court in the *Roberts Case*, p. 10. See in addition to the cases there cited: *Rand* vs. *Townshend*, 26 Vt. 670; *Lewis* vs. *Ry. Co.*, 11 Rich. Law 91; *Kutz* vs. *McCune*, 22 Wis. 628; *Pomeroy* vs. *Ry. Co.*, 25 Wis. 641. Also 2 *Wood on Railroads*, pp. 994–5.

As said by the Court in *Toledo Ry. Co.* vs. *Morgan*, 72 Ill. 155: "If the grantor does not complain of damages done to his land before he conveyed it, the grantee certainly cannot." See *Davis* vs. *Ry. Co.*, 30 Am. and Eng. R. R. Cases, 341, and note, p. 344; *Dixon* vs. *Ry. Co.*, 1 Mackey 78; *Wabash Ry. Co.* vs. *McDougall*, 118 Ill., 229; and cases cited in Rapalje and Mack's Digest of Railway Law, vol. 4, p. 561.

III.

The foregoing propositions may be, and we think are, decisive of this case. But the first and main question presented upon the former argument remains still the

most important question in the case, and we think the question to which the answer is plainest. It is important far beyond this particular case. For there are very few miles upon any land grant road where the constructed line did not deviate from the map line. The case of *Missouri, Kansas & Texas Ry. Co.* vs. *Cook*, 163 U. S., 491, has been understood by many as holding, that in all such cases of deviation the railroad company has no right of way. Upon this understanding many litigations are now pending, and more are threatened, against the title of railway companies to right of way heretofore supposed to be undoubted; right of way occupied without question for many years. It is extremely desirable, from every point of view, that a rule be laid down in this case which will settle such controversies. Therefore, at the risk of repeating what has been already submitted to the Court, we desire to present briefly our views upon this proposition.

THE MAP OF LOCATION FILED WITH THE DEPARTMENT OF THE INTERIOR DOES NOT FIX THE RIGHT OF WAY, BUT THE COMPANY TAKES SUCH WAY ACCORDING TO ITS CONSTRUCTED ROAD.

Section 2 of the Northern Pacific act says: "Said way is granted to said railroad to the extent of two hundred feet in width on each side of *said railroad* where *it* may pass through the public domain." There is no reference in this section to a map. Naturally and gramatically read, this language constitutes a plain present grant, without condition and not dependent upon filing a map.

Section 3 of the same act grants the alternate sections of public land. And these are granted, not on each side of the constructed road where *it* may pass through the public domain, as is the case with the right of way, but upon each side of a *line of location to be designated on a map* filed by the Railroad Company with the Department of the Interior.

It had been decided before the Cook case by Mr. Justice Field at the Circuit in *Central Pacific R. R. Co.* vs.

Dwyer, 1 Saw. 641, and by this Court in *Railroad Company* vs. *Baldwin*, 103 U. S. 426, that the right of way grant was unconditional; that the conditions attached to the grant of alternate sections specified in Section 3 related alone to the lands granted in that particular section and could not be translated and read into Section 2, which was purposely and designedly left by Congress without conditions. This Court said in the Baldwin case:

> "Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

While the particular question in these two cases was, whether the conditions of Section 3, as to land claimed, sold, etc., before definite location, could be read into Section 2, there is no more ground for saying that the condition of Section 3 as to map can be read into Section 2. If any one of the conditions attached by Congress to the grant under Section 3 can by construction be read into the grant made in Section 2, there is no reason why all the conditions of Section 3 should not be in the same manner read into Section 2. Not only does the plain, natural and grammatical construction of these sections compel the conclusion, that Section 2 is a grant without condition and without reference to a map, while Section 3 is conditioned upon the filing of a map, but this Court, we think, so adjudicated in the Baldwin case, and Mr. Justice Field so decided in the Dwyer case. These decisions, we submit, settle the question unless they are to be overruled.

We think it will not, and cannot be, controverted, that had the company built its road it would have become entitled to the right of way granted by Section 2, although it failed entirely to file any map of location. Such failure would forfeit its land grant, but could not forfeit its right of way, because the grant of way is not made upon condition that a map shall be filed. If this be admitted, it settles the controversy.

We submitted on the prior argument certified copies

from the land office of two railroad location maps. One of these maps was of the Northern Pacific location past the premises in question. It shows the location from the Red River of the North to the Missouri, a distance of two hundred miles. The government surveys had been made for but a small part of this distance, and indeed for the most part the land grant roads were located in advance of the surveys. The Northern Pacific was mostly located in advance of the surveys, and this was intended by Congress; for it is provided in Section 6 of the charter that the surveys shall be made "as fast as may be required by the construction of said railroad." A map *could* not be made in advance of surveys which would fix the right of way boundaries. The files of the land department will show that land grant roads have been located in long sections, frequently one map showing many hundred miles of road. Not a map was ever filed, or ever requested by the department, on a scale large enough and with sufficient detail of reference so it *could* fix the right of way. No monuments, surveys or measurements were required to be noted on the map. The very line on many of these maps designating the railroad location would, when scaled for width, be found wider than the right of way granted. The reason of this is not far to seek. The department never understood that the map fixed the right of way. It never sought to determine its boundaries; it never surveyed it and did not except it in its patents. *Ex parte Arnett*, 20 L. D. 131; *Dunlap* vs. *Shingle Springs Ry*,, 23 L. D. 67. This practice of the department is a long-continued construction of the act of Congress. A construction that the right of way did not depend on the map and was not indicated or fixed by it, the right of way being granted by Congress where the road was built and being entirely useless to the company if granted in any other place. Is it not irrational to say that right of way is fixed and determined by something which cannot fix it; by something which no engineer could take and, from it, lay out the right of way on the ground? Does not such a construction create a litigation between every land

grant road and every adjoining land owner as to the boundaries between them? If the constructed road does not determine the right of way boundaries, the right of way of every land grant road is a float to-day, with its boundaries entirely *incapable of determination.*

Our construction harmonizes the law of right of way under special charters with the law of right of way under the general act of 1875, as decided by this Court in *Washington & Idaho R. R. Co.* vs. *Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77. And there is no reason why there should be a different rule. Congress, in the act of 1875, Section 4, recognizes the impossibility of designating right of way by map through an unsurveyed country, by providing in such cases that the map shall be filed within one year *after the surveys.*

There is no analogy between the right of way grant and a grant of odd sections; no reason in the nature of things why, because the odd sections granted are determined according to the location map, the right of way must also be determined according to the same map. The department of the interior, under the policy which Congress had adopted, of leaving the country open for settlement in spite of railroad grants, needed to have a map by which the sections granted to the railroad company could be determined, and the country so kept open to settlement without depriving the railroad company of the land intended for it. But, as this Court said in the Baldwin case, there is nothing in the policy of the government which requires that the right of way should depend on any condition like the filing of a map, because lands sold by the United States before the road was built would not be less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. Moreover, unless the department was to fix the limits of the right of way, and reserve it in its patents, there was no reason why it should be informed of its boundaries.

The question was suggested on the former argument by Mr. Justice Harlan, whether our construction did not leave the company free to build its road through *any por-*

tion of the public domain and claim a right of way. In answer we suggest first, that there is no pretense in this case of any unreasonable departure from the route specified by Congress. The defendant in error on the contrary offered to prove on the trial, that the departure in question was necessary for good engineering reasons in order to secure a better approach to the Missouri River bridge. But there are several limitations on a company, which would prevent such unreasonable departure from its line as the learned Justice had in mind. First, the Northern Pacific charter (Section 1) was "to build a continuous railroad, beginning at a point on Lake Superior, in Minnesota or Wisconsin, thence westerly by the *most eligible route*, as shall be determined by said company within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound." It is settled by decisions of this Court that the company could not make an unnecessary and unreasonable departure from the most direct and feasible route. Second, this Court decided in *Van Wyck* vs. *Knevals*, 106 U. S. 360, that the constructed line might deviate from the map line without a forfeiture of the land grant, but that the odd sections to go to the company were to be determined according to the map of location; with this further intimation (p. 369), that a deviation beyond the limits of the grant might constitute a forfeiture. See, also, Secretary Lamar's decision *In re Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 6 L. D. 209. So that it is probable the right of way might be forfeited by deviations beyond the limits of the grant. Third, Section 4 of the Northern Pacific charter provides, that whenever the company shall have completed twenty-five consecutive miles of road, the President of the United States shall appoint three commissioners to examine the same; that the commissioners shall report to the President, and if it shall appear that said road has been completed in a good substantial and workmanlike manner, and in all other respects as required by the act, the commissioners shall so report, and patents shall thereupon be issued to the company. The act therefore places it within the power of the President and his commissioners to determine

whether the road is properly located; this is a sure guaranty against unreasonable and unnecessary deviation.

IV.

The record shows that the section of road through the premises in controversy having been completed, commissioners were appointed by the President under Section 4 of the Northern Pacific charter and reported to the Secretary of the Interior, November 24, 1873. November 28, 1873, the Secretary recommended to the President acceptance of this report, and the recommendation was approved by President Grant, December 1, 1873. As before shown, the land on which the road was built was public land of the United States at this date. The report of the commissioners (Transcript, p. 25) says, among other things:

> "After a thorough examination, we find that the line is so located as to serve the purpose both of a central and convenient channel for the trade and travel of the country through which it passes, and that proper regard has been paid to future as well as present needs of local and also of through traffic."

Attached to this report was an accurate map showing the exact location of the constructed road (Transcript, p. 25). In the report was a recommendation that the road be accepted by the government (Transcript, p. 29).

This executive action accepted the line actually constructed across the premises in question and so shown in the report in satisfaction and performance of the requirements of the company's charter. The land being public land of the United States at that time, it was within the jurisdiction of the Secretary of the Interior, and the action shown should be treated as the determination of a special tribunal created by Congress to pass on the question not subject to review in the courts. This acceptance was an acquiescence by the United States, binding on its subsequent grantee, in the appropriation which the company had made of this right of way. The opinion of Secretary Lamar, in the case of

Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 6 L. D. 209 applies. The Secretary was considering deviations made necessary for engineering reasons, and adopted the opinion of the Attorney General (16 Opps. Atty. Gen. 457) as follows:

> "Some deflections must in many cases be expected from the line of the road as definitely located; but it is for the department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern in all cases. * * * I would suggest that, if the deflections be in their character immaterial—if they are made for the purpose of avoiding engineering obstacles, which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location."

V.

We submit that the opinion in *Missouri, Kansas & Texas Ry.* vs. *Cook* follows, contrary to the language of Congress, to which attention has been called, a mistaken analogy between the grant of right of way and the grant of odd sections; an analogy only to be established by incorporating into Section 2, which was passed by Congress without condition, the conditions which Congress attached to the grant of odd sections made in Section 3. That this can not be done had previously been held by this Court in the Baldwin case.

But even if the Cook case is to stand, it is controlling only upon the particular facts therein considered and cases involving similar facts.

This case is distinguishable in essential particulars. First, the record in the Cook case contained a stipulation, which showed that the right of way in question had not been approved by the President. Here it has been. Second, intervening rights had attached in the Cook case

before the company changed its line. Here none had attached, and this fact brings this case directly within the decision in *Washington & Idaho R. R. Co.* vs. *Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77.

C. W. BUNN,
Counsel for Plaintiffs in Error.

No. 93.

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JAMES H. MCKENNEY
CLERK

Sup. Brief of Holcomb for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 93.

Filed Feb. 24, 1898.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, *Plaintiffs in Error,*

vs.

PATRICK R. SMITH.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF

On Reargument for Plaintiffs in Error, filed on special leave of Court.

C. W. HOLCOMB,
Attorney.

BYRON S. ADAMS PRL., 513 ELEVENTH ST.

Supreme Court of the United States.

OCTOBER TERM, 1897.

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vs.

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ERROR OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ON REARGUMENT.

Supplemental Brief for Plaintiffs in Error, filed by special leave of Court.

The "Statement of Facts" and "Assignment of Errors" herein are taken from the brief of C. W. Bunn, Counsel for Plaintiff in Error, filed in the office of the United States Supreme Court October 22, 1897.

STATEMENT OF FACTS.

This is a writ of error to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment determining that Patrick R. Smith (plaintiff in the Circuit Court) is entitled to possession of the lands in controversy and to recover from plaintiffs in error the sum of $30,024.21 damages for withholding said property.

The action is brought by Smith in the Circuit Court of the United States for North Dakota. The property in dispute is described in the complaint as lots 5, 6, 7, 8, 9, 10, 11 and 12, block 8, according to the plat of Bismarck, North Dakota. In fact, it is, and has been since the construction of the Northern Pacific Railroad, occupied by the main and yard tracks of that road in Bismarck, and all lies within 200 feet of the center line of the main track.

The Railroad Company in its answer alleged lawful possession and title under the charter of the company (Act of Congress July 2, 1864). The answer pleads also a general denial and former adjudication in favor of the Railroad Company denial in the courts of the Territory of Dakota: (Transcript, p. 5).

The Circuit Court on a former trial rendered judgment on the merits against the plaintiff, which was reversed by the Circuit Court of Appeals: *Smith* vs. *Northern Pacific R. R. Co.*, 58 Fed. Rep., 513, 7 C. C. A., 397. On the second trial the judgment was rendered which is here for review; it was affirmed by the Circuit Court of Appeals, 69 Fed. Rep., 579: (Transcript, p. 60).

The case at the Circuit was tried by the court, a jury being waived. The court's findings are at pp. 15–17 of the Transcript. A bill of exceptions was settled and is printed at pp. 20–46 of the Transcript. The findings show this state of facts:

The plat of Bismarck was formerly known as Edwinton, its name having been changed by act of the legislature. The property in dispute was part of an 80 acre tract entered by John McLean as mayor of the city of Bismarck on behalf of its inhabitants under the Townsite Act (Revised Statutes, sec. 2387), and patented to him thereunder July 21, 1879: (Transcript, p. 15). The corporate authorities subsequently conveyed to the defendant in error: (Transcript, p. 15).

The court further finds that this 80 acre tract was selected as the location of a portion of the townsite prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior & Puget Sound Land Company (which company made such selection) sold lots upon this townsite according to a plat which was afterward, February 9, 1874, recorded with the

Register of Deeds of the County. By January, 1873, thirty buildings had been erected on the townsite, and from that time to 1879, when patent issued, the population continued to increase. It was upon the townsite *thus* selected and the plat *thus* made, which was afterward adopted as the site of the City of Bismarck, that the patent to McLean was based. The patent contained no reservation of any right of way for the Railroad Company: (Transcript, p. 16).

Note that no selection or entry was made by the TOWN *authorities, and no proceedings instituted in the land office (so far as the record shows), prior to patent July 21, 1879.*

The public survey of the township containing the 80 acre tract was made in October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

The foregoing is the title of the Defendant in Error. That of the Northern Pacific Railroad Company is as follows:

The company claims under the act of July 2, 1864, creating the corporation, sec. 2 of which act grants to the company a right of way 200 feet on each side of the *railroad* where *it* (the railroad) may pass through the public domain. On February 21, 1872, the company filed in the Interior Department its map of general route east of the Missouri river. This route passed about three-quarters of a mile south of the said 80 acre tract. May 26, 1873, it filed its map of definite location, which was accepted by the Commissioner of the General Land Office. The line of definite location, according to this map, passed about two miles south of the land in dispute. During 1872 some grading was done on the map line. During 1872 the company staked out a line across the property in question substantially where the track was afterwards built. This line was graded in 1873, and in June, 1873, the track laid where it has ever since been. The grading on the map line two miles south was abandoned. The property is within two hundred feet of the main track as constructed: (Transcript, pp. 16, 21).

As to former adjudication the facts found by the court are: In the year 1877 the Railroad Company commenced an action in the District Court of Burleigh County, Territory of Dakota, in which county the premises were situated, against Patrick R. Smith, defendant in error here, and others, to

recover possession of part of the premises in question, Smith being then in possession. The court had jurisdiction of the parties and subject-matter, and the Railroad Company recovered a judgment against Smith for the possession of said premises, and nominal damages for withholding the same: (Transcript, pp. 16, 17).

The complaint of the Company in the former action alleged "that the Northern Pacific Railroad Company is a corporation created by and exists under an act of the Congress of the United States entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' approved July 2, 1864. * * * * That in May, 1873, plaintiff became seized in fee for the use and purpose of a right of way to the following premises." Smith was alleged to be in actual and wrongful possession. He demurred to the complaint. The demurrer was overruled, and judgment thereupon rendered for the company to the effect before stated: (Transcript, pp. 12–15).

It is agreed in the record that the value of the use of the whole premises here in question was $26,000, and omitting that part thereof described in the complaint in the former action, $21,000: (Transcript, p. 10). The plaintiff's recovery below was for $26,000 and interest, and for possession of the whole property. The former adjudication was held to be no bar either in whole or part to this action. A finding dividing the damages was requested, denied and exception taken: (Transcript, pp. 43–45).

Upon the trial plaintiff in error offered in evidence the complaint in said former action to show that the plaintiff in error there claimed the land as its right of way under the act of 1864, and recovered it in the former action upon that ground. This evidence was excluded by the court and the plaintiff in error excepted: (Transcript, p. 35).

Upon the trial plaintiff in error offered to prove that after its road had been constructed over and beyond the premises in dispute, commissioners were duly appointed by the President of the United States under the provisions of sec. 4 of its charter, to examine and report thereon; that they performed their duty and transmitted their report to the Secretary of

the Interior, by whom it was forwarded to the President November 28, 1873; that this report was approved by the President December 1, 1873; that the report referred to contained an exact statement of the location of the constructed line of plaintiff in error, and an approval thereof. This offer was rejected and plaintiff in error excepted: (Transcript, pp. 22–30).

The plaintiff in error offered in evidence on the trial depositions of two civil engineers, Charles A. F. Morris and Montgomery Meigs. These depositions are in the record, and they tend to show that lines of definite location on maps are not necessarily or usually the exact lines of construction. That actual construction deviated in this case, and customarily does on all roads, from the map of location for good engineering reasons; that difficulties always develop and economies become apparent upon construction, which cannot reasonably be foreseen at the time of location. These depositions were excluded by the court and plaintiff in error excepted: (Transcript, pp. 31–41).

It will be noted that all the maps and public documents referred to in the findings, stipulations and bill of exceptions (or copies thereof) are made part of the record and may be used, read or referred to by either party and considered by the court: (Transcript, pp. 45–46).

The material parts of the act of July 2, 1864, are sec. 2 and sec. 3 which are as follows:

> SEC. 2. AND BE IT FURTHER ENACTED, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said Corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof; said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turn-tables, and water

stations, and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of this act, and acquired in the donation to the (road) named in this bill.

SEC. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the "Northern Pacific Railroad Company" its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this

act: Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word "mineral," where it occurs in this act, shall not be held to include iron and coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said "Northern Pacific Railroad."

ASSIGNMENT OF ERRORS.

The Plaintiffs in Error assign upon this record, and will rely upon, the following errors:

1. The courts below erred in ruling and holding that the Northern Pacific Railroad Company did not have title to the land in controversy as part of its right of way under sec. 2 of the act of July 2, 1864.

2. The courts below erred in ruling and holding that the defendant in error did have title to the land in controversy under the patent to McLean of July 21, 1879, and the subsequent conveyance under said patent to defendant in error.

3. The courts below erred in ruling and holding that defendant in error had any title or right to the possession of said premises.

4. The courts below erred in ruling and holding that said former judgment was not a bar to this action, and in excluding from evidence the record in said former action.

5. The courts below erred in ruling and holding that said former judgment was no bar, at least as to that part of the premises involved directly in the former action and as to $5,000.00 and interest of the judgment for damages awarded.

6. The courts below erred in excluding from evidence the testimony showing the acceptance by Commissioners and by the President of the constructed line under the act of July 2, 1864.

7. The courts below erred in excluding from evidence the deposition of Mr. Morris and Mr. Meigs.

ARGUMENT.

We request that the omission in this brief of a discussion of any of said matters of fact, or errors assigned, be not taken as a waiver thereof. What this brief does not expressly argue it is presumed will be fully presented in the brief of the senior counsel of plaintiffs in error.

The right of way granted to said company was a grant *in præsenti* "*be, and the same is hereby, granted,*" etc. (Schulenberg *vs.* Harriman, 21 Wallace, 44.) * * * "*Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad.*"

It was a present grant for said entire width. The grant was to said company, its successors and assigns, "for the *construction* of a railroad," etc.

(Sec. 2, act of July 2, 1864, Statutes at Large, Vol. 13, page 367.)

It was an unconditional grant.

The Court, in St. Joseph & Denver City Railroad Company *vs.* Baldwin (13 Otto, p. 426), said:

"But the grant of the right of way by the 6th section contains no reservations or exceptions. *It is a present absolute grant,* subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms," etc.

The said language is equally applicable to the grant of the right of way in the case at bar, the grants being identically the same in the respect aforesaid.

In the case at bar, as appears from agreed statement of facts, pages 8 *et seq.*, transcript of record, the land involved was selected for a portion of the townsite of Bismark, and surveyed prior to June 20, 1872; lots were sold within that selection in 1872, and occupied by buildings prior to January, 1873. The selection and plat of the townsite were filed in the county, February 9, 1874. That townsite selected, platted and occupied was afterwards adopted as the site of Bismark, and upon that selection and plat patent was based which was issued to John A. McLean, Mayor, in behalf of the inhabitants, July 21, 1879, under section 2387 of the U. S. Revised Statutes relating to townsites.

The map of the general route of the railroad east of the Missouri river was filed in the Department of the Interior on February 21, 1872, and passed the tract in controversy about three-quarters of a mile south of it.

On May 26, 1873, the Company filed in said Department its map of definite location, of its line of road, and the line thus fixed passed about two miles south of said land in dispute. During 1872 grading was done on that last mentioned line, and also a line was staked out across the tract now in dispute; in the spring of 1873 grading was done upon this line thus staked out, and in June, 1873, the road was constructed across it, and has since remained and been operated upon it.

At date of the grant (July 2, 1864), it would appear that the said tract was unoccupied by any person, no claim had attached to it, and that it was then unqualifiedly subject to any disposition Congress saw fit to make of it.

It also appears that the tract was not entered and paid for, nor patented, at the date of the withdrawal on general

route, nor at date of the definite location of the route of the Railroad Company, nor at date when the road was constructed upon the land in question, and the road was constructed across the land prior to the townsite plats being made of public record in the county.

Confining our attention to said facts alone, and the propositions are to be considered which fall under the first question to which this Honorable Court directed attention in its order for reargument, to wit:

"Could occupants of public lands, before they were surveyed and declared open for settlement, by subsequently availing themselves of the town-site act, procure a title paramount to that of a railroad company which, under a previous grant by Congress, had taken possession before the town-site patent was granted? See Northern Pacific Railroad Company *vs.* Colburn, 164 U. S., 383."

We remark first:

The town-site laws, in their length and breadth, purposes and warrant, are merely pre-emption laws.

Pre-emption, under the public land laws, is the right of one party to purchase a tract in preference to any other person.

But it has been held by this Court that, prior to entry and payment, no vested right was in pre-emptors, and hence it was competent for Congress to make any other disposition of the land. This was the principle in Hutchings *vs.* Low, 15 Wallace, 77; in Frisbie *vs.* Whitney, 9 Wallace, 187; Wirth *vs.* Branson, 98 U. S., 118, and cases therein cited.

If this be the law (and it is nowhere contradicted), then it would appear that *an absolute grant* at any time prior to such payment and entry, or the acquisition of a vested right, would necessarily prevail over a mere occupancy and improvement.

Said absolute grant was not in the present case of the fee

to the land, but of an easement in it. That easement, however, was properly and plainly subject to said rule.

In Buttz *vs.* Northern Pacific Railroad Company (119 U. S., 55) this Court said:

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." See also U. S. *vs.* So. P. R. Co. (146 U. S., 570).

Land in said odd sections, within the granted limits, which was clear of claims at the said date of withdrawal on general route (February 21, 1872), was not thereafter subject to sale or pre-emption if it also fell within the granted limits after definite location of the line of the road, but passed to the grantee.

It was thus with the conditional grant of *lands*, as held by this Court.

The grant of the right of way, as aforesaid, was absolute and unconditional, as also held by this Court in parallel cases, but necessarily fell within the limits of the grant of lands. Hence, the grant of the right of way must *at least* have comprehended any lands which were clear of adverse right at the date and within the limits of such withdrawal on general route, and precluded the sale of any lands except such sale was, and remained subject to, that easement.

It, however, attached to the even as well as to the odd or granted sections, by its terms, if they were "public lands" *at date of the grant.* The withdrawal on general route was a legal notice to all men, in addition to the notice by statute, that

any subsequent occupation, or entry, or purchase, upon odd or even sections therein must be subject to said servitude.

These results are unavoidable, in view of what this Court has already held concerning the character of like grants of the right of way; the function of said withdrawal on general route, and the right of the Government to make the grant. It would seem to follow that the purchase, entry, and patent, to the Mayor of Bismark, as trustee, of the land now in question, all having been subsequent to the grant; to said withdrawal on general route, and all also falling within the granted limits of definite location, were likewise subject to said easement; for at date of said withdrawal on general route the lands were the property of the United States; were "public lands"—not private property—and fell within the plain language of the act, to wit:

"That the right of way *through the public lands* be, and the same *is hereby, granted*," etc. (Section 2, Act of July 2, 1864.)

Now, what are "public lands"?

This Court, in the case of Newhall *vs.* Sanger (2 Otto, 761), said:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Manifestly, and pursuant to said definition, they were such as were not in private ownership, and they were in the case at bar "subject to sale and disposal under general laws," or they could not have been subsequently purchased by the Mayor, as trustee.

A grant is a contract executed. (Fletcher *vs.* Peck, 6 Cranch, 87.)

A legislative grant cannot be repealed. (Town of Pawlet *vs.* Daniel Clark and others, 9 Cranch, 292.)

The granting act is a law as well as a conveyance, and such effect must be given to it as will carry out the intent of Congress. (U. S. *vs.* S. P. R. Co., 146 U. S., 570.)

The railroad, in the present case, was built; no forfeiture was declared, and none is now possible; the grant was anterior to sale, entry, and patent; the patent is thus necessarily subject to said servitude under the facts stated.

In Bigbee *vs.* Oregon & Cal. R. Co. (139 U. S., 663) this Court said:

"This very question arose in the Supreme Court of California in the case of Doran *vs.* Central Pac. R. Co. (24 Cal., 245), in which the court observed (p. 259) that 'the grant by Congress of the right of way over any portion of the public land, to which the United States have title, and to which private rights have not been attached under the laws of Congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering, in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry.' We regard this exposition of the law as sound," etc.

This would seem to be quite conclusive upon the precise point now under examination. The Northern Pacific Company, under it, could not be defeated by settler claimants either individual or in the capacity of a townsite, because the United States *had title* and made said absolute grant, and there was then no adverse right or claim.

It is also proper to state that it was not essential to the right of way of said company that the patent should recite that right, or in form contain a reservation of it from the title conveyed. It is not the practice to include such reservations in patents.

The United States, no more than a private individual, can convey a greater title than it has in itself.

When it executed the patent and made the sale to the Mayor of Bismark, it had the fee to said tract *less* the right of possession and use which had been granted by section 2 of said Act of 1864. It could by no possibility convey more to the Mayor, and it was not in the power of its agent, the Commissioner of the General Land Office, to convey more. Hence that patent must be construed with reference to said grant, and declare its value to be the fee qualified by said easement. The record of the right of the company was to be found in the public grant; the records of the Interior Department, and the construction on the ground.

If, however, as in this case, a different construction of said patent has been adhered to in the court below, we respectfully submit that the law and right should be declared by this Court.

In the case at bar there was simply a deviation of constructed road from the line of definite location. Everything else was *strictly* and conclusively in favor of the Company.

The decision below holds that the Company by filing its map of definite location exhausted the right of selection given by Congress, and irrevocably fixed the line of this railroad and the limits of the right of way granted to it as against third parties holding under patents from the United States.

What we have already said in part answers this. So far as the *patent* was treated as concluding the Company, it seems to us quite clear that *its* value should be declared. It does not seem to us that the courts have authority to ignore a grant made by statute, or decline to give each—grant and patent—their respective value.

This is not answered by the claim that the action in this case is in ejectment where the title a man has must prevail, and not the title which it may be he ought to have. For

there is no higher muniment of title than an unconditional grant from Congress; or, a grant with implied conditions which have been fulfilled.

That grant is in a public law; under it plaintiff in error is in actual possession, and he pleads that title and its record.

The Company *has* that title—not in the form of a patent, but in the form of a prior *grant* by Congress, and the grant is in court as certainly as is the patent.

A deviation of constructed road from the line of definite location in cases like this one appears already to have been passed upon by this Court.

We cite the case of St. Joseph and Denver City Railroad Company *vs.* Baldwin (13 Otto., 426).

The date of the grant in that case was July 23, 1866 (14 Statutes at Large, 210). At that date the land was vacant and unoccupied and belonged to the United States.

Baldwin acquired whatever rights he possessed in October, 1869.

The line of road was definitely fixed in October, 1871.

It is to be noted that by section 6 of the granting act (on page 211 of 14 Statutes at Large) the grant of the right of way is substantially identical with that in section 2 of the granting act in the case at bar (page 367 of 13 Statutes at Large).

The Court said that the act made two grants—one of lands and the other of a right of way; that the grant of the right of way was "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road should be constructed and used for the purposes designed."

Also:

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where

any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

The railroad company in that case claimed that Baldwin took the land subject to its right of way. Baldwin claimed that the company's right of way took effect only from the date at which the company filed its maps designating the route with the Secretary of the Interior. This Court held that the act was operative upon "*all persons* acquiring *any portion* of the *public lands, after the passage of the act* in question."

In other words, it was a grant *in præsenti* and took effect from its date, and all persons were chargeable with notice from the public statutes.

It will not clear away difficulties real or imaginary to say that the question in that case was not the precise one arising from a definite location of the route upon one line, and the subsequent construction of the road upon another line; because the Court took pains to clearly explain that the purpose of the definite location of that line was to fix the limits of the *grant of lands* so that what would not be taken by it would be open to settlement and purchase. It also emphasized an important point when it declared that the lands would not be the less valuable for settlement because a road should run

through them. This is important as showing that Congress by a present, absolute, unconditional right of way, did not consider it a burden or loss to settlers, but an advantage; and thus was the theory rebuked which gave rise to those contentions of a settler or owner who would by such legislation first profit himself and then punish the company whose construction of the road brought him such advantage.

But the direct and most important points decided were that the right was effective from date of the act, and was not dependent upon the definite location.

But here it is quite natural that it should be urged that, as the definite location in that case was subsequent to Baldwin's settlement, his claim was of course subject to the right of way on the line of that definite location, and that the point of deviation in construction from that line of location was not in the case.

Well, we refer to this case in connection with this point for what it contributes to the proposition of such deviation, as found in other cases we will cite directly.

But we note in this case as follows: That the line of definite location was virtually eliminated from consideration. The Court said it was for another purpose. It did *not* say that the grant of the right of way derived any force or control in that case from the *construction line* being the *line of definite location*. In fact, we do not see that the point was either made by Baldwin or respected by the Court as in any event material. Had it been material it is presumable that it would have been given a clear statement.

Now, we submit, that if the line of definite location of route, and the line of construction of the road must be identical, we must look somewhere else than to that case for the authority.

We also submit that there is no express authority to that effect in the act which made the grants in that case, and no

provision to that effect in the acts relating to the Northern Pacific Railroad Company.

If we are right in this, then, if such be the law, it is to be found in the principle involved, and in what is necessarily implied from the grant itself.

But this Court said in case of U. S. *vs.* Southern Pacific R. Co. (146 U. S., 570): "The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant."

Hence, is it not an assumption, not strictly warranted, that the definite location of the line of route, and which is expressly declared by this Court to be for one certain purpose, is to be absolute or potential for another purpose?

In Missouri K. & T. R. Co. *vs.* Roberts, (152 U. S., 114), the right of way involved lay across lands in reservation for the use of Indians. This Court said that the United States had the right to authorize the construction of the road through the reservation, and to grant absolutely the fee of the two hundred feet in width as a right of way to the company.

In that case the act granting lands and the right of way (July 26, 1866, 14 Statutes at L., 289) provided, "that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to *locate the route* of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States."

The Court said that the company located its road through those reserved lands with the approval of the President,

"and constructed the road in *substantial* conformity with the act of Congress."

That the right of way was granted unconditionally, subject only to said approval by the President, and the title "vested in the company either upon the passage of the act of Congress, July 26, 1866, or upon the construction of the road, and so far as the present case is concerned, it does not matter which date be taken."

Here it may well be noted that upon the definite location of the road and the filing of map in the Land Department the grant to the odd sections attaches, and if they be clear of adverse claim, the title *eo instanti* passes out of the grantor and into the grantee.

But this Court does not say that in respect of the right of way grant. It says it vested in the grantee either at *date of the granting act* or *upon the construction of the road.* This is an express holding, and gives the definite location no control whatever in the matter. That language was explicit. It could apparently have but one meaning.

We invite attention to two other points in that decision:

1. That mere *occupancy* under a *right* of occupancy secured by treaty, did not interfere with the right of the United States to grant said right of way, or of the company to occupy, construct, and take title. Reverting for a moment to the townsite of Bismark *prior* to its entry and patent, it may be remarked that occupancy alone has no precedent for controlling and defeating the present grant of Congress. Even had there been actual townsite occupancy at date of the granting of the right of way to the Northern Pacific Railroad Company (which was not the case), yet there was no claim of record; it was not known to the law; it did not remove the land from Government ownership, nor vest a right in the occupants as against the United States, and

hence constituted no obstacle to the absolute grant to another, which would, of course, rest in public policy. Land in that condition may, as a fact, be occupied, and yet without any certainty that such occupation will be continued, and without any notice that it is intended to be continued, or law which limits Congress in the disposition of it, while at the same time, it might be conceded that under the general laws, as between the town and another party, such occupation might defeat the other party, ~~under general laws~~.

2. That the Court had in mind the *location of the route* through said lands, and evidently the point that there was at least a slight deviation of the constructed road from such location, and hence referred to a construction "in substantial conformity with the act of Congress" as all that the law could be construed to contemplate.

Also in the case of Bybee *vs.* Oregon & California Railroad Company (139 U. S., 663), this Court made a sharp distinction between the right of way, and the right to lands under the grant:

"The distinction between a right of way over the public lands, and lands granted in aid of the construction of the road, is important in this connection. As to the latter, the rights of settlers or others who acquire the lands by purchase or occupation between the passage of the act and the actual location, and the identification of the lands are preserved unimpaired, *while the grant of the right of way is subject to no such condition;* and in the construction given by this Court to a similar grant in St. Joseph & D. C. R. Co. *vs.* Baldwin (103 U. S., 426), a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railroad company," etc.

Now, in this, no mention is made of the line of definite location.

It is expressly declared by this Court that such line is for

another purpose, and is *not* to control the right of way; and it would clearly seem to follow that while such line is absolutely controlling in respect to the grant of *lands*, it can be only a tentative matter in respect of the constructed road and has no conclusive force to determine the exact right of way.

Were it otherwise, how would it be an absolute and unconditional right?

Also, in the reason of the thing, in view of engineering difficulties notoriously existing and to arise in a grant to a railroad which is to run through a large extent of country diversified by mountain, swamp, hidden quicksand, and obscure and unknown natural obstacles which could hardly be well understood in advance of construction; the development of centers of trade and population which required slight deviations in order to answer public convenience, or even necessities—a matter of some force in a grant made from public considerations—all these things emphasize the reason why the right of way should have been given with the purpose that it should take effect at date of the grant and control on the line of actual construction.

Now, having seen from the decisions of this Court, and the purpose and reason of the statute, what the intent of the law is and its express grant contemplates, to wit, that the right of way is to relate to the date of the grant, and to take effect as to any particular tract at the date of construction, it is proper to see what relation it has and ought to have to the route marked by the line of definite location.

Let it be remembered that there is not a word in the grant which expressly provides that the construction shall be upon the exact line of definite location; that said line is required to be fixed so that it may be ascertained with certainty what lands are to be held to satisfy the grant of lands to the company, and what lands are to be open to settlement and entry

by our citizens, and that this Court has expressly held that all settlements and claims initiated subsequent to an unqualified grant of the right of way are subject to it, notwithstanding they antedate definite location and construction.

There is in the nature of the grants a connection of law as to the limits within which the construction of the road may vary but outside of which it cannot go.

That is fairly indicated by the decision in Van Wyck *vs.* Knevals (106 U. S., 360). In that case it was contended that the right claimed under the St. J. & D. C. Railroad Company, to whom a grant of lands was made by act of July 23, 1866, was invalid for different reasons, among which was the charge that the constructed road deviated from one to three miles from the route or line of definite location laid down on the map. The Court said :

" As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it ; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the land granted, might, perhaps, raise the question whether the grant was not abandoned ; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant."

In the matter of the location and construction of the Chicago, St. Paul, Minneapolis & Omaha Railway Company (6 Land Decisions, 209), Secretary Lamar, in the matter of the adjustment of the land grant of said road, referred to the failure of the company to construct its road upon the line of definite location, and to said case of Van Wyck *vs.* Knevals, quoting the paragraph as above, and said :

" From the foregoing extract, it is apparent that the Supreme Court did not regard a deviation in the construction of

the road from the line marked on the map as a matter which required the consent of Congress, so long as such deviation or deflection did not 'take the road beyond the granted limits.' In the present case the deflection is nowhere over eight miles from the line of location, whilst the granted limits are ten miles on each side thereof. The case of Van Wyck *vs.* Knevals, *supra*, was decided at the October term, 1882, of the Supreme Court; but prior to that time this Department had made substantially the same ruling in certainly three cases."

He quoted from the opinion of the Attorney-General in one of said cases, who held that to entitle the State to the benefit of the lands granted, it was necessary that the road should be constructed according to the line of definite location, and if a different road be constructed than that definitely located, the *State would be entitled to nothing under its grant.* But whether the road as constructed is or is not the road definitely located, it was held, was a question for the Interior Department to determine, and was one largely within the discretion of the Secretary. On this point he quoted from the Attorney-General's opinion (16 Ops. Atty.-Gen., 457):

"Some deflections must in many cases be expected from the line of the road as definitely located; but it is for the Department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern all cases. * * * I would suggest that, if the deflections be in their character immaterial—if they were made for the purpose of avoiding engineering obstacles, which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location."

Secretary Lamar referred to the Department rulings theretofore made to like effect, agreed with them, and decided accordingly in the case before him.

It may be said, so far as we are advised, that said rule has obtained and been the rule of the Executive Department from first to last, and that the said decision in Van Wyck *vs.* Knevals was understood to be in support of the executive rule and practice.

The gist of that construction was that such deflection of the constructed road from the line of definite location as did not depart from the limits of the grant, and was in consequence of engineering obstacles which could not be otherwise avoided without exaggerated expense, was not regarded nor treated as any departure at all from the line of definite location, but as a substantial adherence to it, and in legal identity with it, and it was thus treated uniformly by the officers to whom was committed the administration of the granting acts.

Decisions and long-continued construction of law by the Land Department, while not binding upon this Court, are entitled to great respect, "and ought not to be overruled without cogent reasons." (U. S. *vs.* Moore, 95 U. S., 760.) See, also, Hastings and Dakota R. C. *vs.* Whitney (132 U. S., 357) and cases cited to like effect.

We submit that if a deviation of constructed road from the route fixed by the definite location, as aforesaid, does not destroy the identity of the route and road in the matter of the *conditional* grant of lands which was made dependent upon such route, then it would be illogical and erroneous to hold that it destroyed the *unconditional* grant of a right of way under the same facts.

In the case at bar the reasons for the deviation of the constructed road from the line of definite location to its line of construction are shown by the testimony, copy of which is

found on pages 31 to 34, inclusive, and 36 to 41 of transcript.

We submit that the objection thereto was not well taken; that the evidence was competent, relevant, and material. It could not be otherwise under the said construction of law, and the rule and practice of the Interior Department, justified by the aforesaid authority.

We now come to the decision in Missouri, Kansas & Texas Railway Co. *vs.* Cook (163 U. S., 491).

With profound respect for the great learning of this Court, and a keen sense of the prodigious labor required of its members, which sometimes must render mistake possible, we submit our belief that said decision in its broad statement was erroneous and should be overruled.

It is true that that case was peculiar in some of its facts; that there was a definite location presumably about December 24, 1867, an acquisition of claim by one Hodges thereafter, and a sale to him October 9, 1869, and subsequent to that sale a change of location which carried the road across his land at a time when he had a vested right, and it was not in the power of the Government to refuse him a patent.

The Court seem to treat the definite location as the establishment of a fixed line incapable of variation for any reasons. It quoted from Van Wyck *vs.* Knevals, *supra*, as follows:

"We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the

route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route."

It said further:

"The easement and the lands were afloat until by definite location precision was given to the grant and they became permanently fixed."

It referred to this fact of the location of line of route in 1867; the sale to Hodges in 1869; the new line of location run by the company in 1870, crossing the tract in controversy, and the patent issued to Hodges later in 1870.

The Court then said:

"The issuing of the patent shows that the land department had found the existence of all the conditions, such as actual occupancy of and residence on the premises and like matters requisite thereto, and it took effect by relation as of the date of the certificate. It follows that as the rights of the settler were required after the right of way of the road had been definitely located, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain, and he could not be deprived of rights which had thus attached by the subsequent action of the company."

The Court deemed it unnecessary to consider what effect, if any, deviations of that kind might have upon the grant (Van Wyck *vs.* Knevals, 106 U. S., 360; 16 Ops. Atty.-Gen., 457; 6 U. S. Land Dec., 209); as "whatever the rights of the company in this regard, such a change could not affect the rights of third parties, which had in the meantime lawfully intervened," citing Washington I. R. Co. *vs.* Cœur d'Alene R. & Nav. Co. (160 U. S., 77).

We do not think the last-named citation is an absolutely controlling one, inasmuch as the facts were not parallel.

That was a question of priority of right between two competing railroad companies, under the general right of way act of March 3, 1875.

Admitting that the line of location is definitely fixed by the map thereof filed in the Interior Department, it does not seem that it forbids variations made essential by engineering obstacles, etc. Those conditions have always prevailed with the officers of the Government to whom the law assigns the duty of executing the statute; and their construction of the grants on this point is and should be entitled to great weight. There is most reasonably a necessity for a construction such as is adapted to an application of the grant to the unavoidable conditions which at the date thereof were known to be inseparable from its enjoyment.

The said variations, within the limits of the grant, have not been regarded as a legal deviation from said fixed line of route, when made for any of said reasons. Those grants have been administered on the theory that such conditions as compelled the variations as aforesaid were inevitable natural conditions, notoriously possible everywhere, and necessarily contemplated as incident to the enjoyment of the rights conferred.

If the right of way be determined by the definite location, in the same manner and by the same act as the right to the granted lands, it would seem that it should not be lost by a slight deviation for said purposes, in consequence of which neither Court nor Executive Department has ever held that a single acre of the granted lands was forfeited. Why should said distinction be made?

If the company locates its line, and pending construction a physical obstacle such as justified a slight variation, under the uniform practice before stated, develops, is the company to be made to suffer a diminution of its right of way, or its loss altogether?

Were not said contemporaneous and long and unvarying practice and construction of the law, which permitted such variations for said reasons, notice to persons who in advance of the actual construction of a road sought to derive advantage from purchasing land so near the line of location as to easily be in reach of such unavoidable variations?

Is not this matter of variations within the limits of the grant of lands to be resolved by a construction made wholly reasonable by a recognition of notorious conditions in view of which every such grant has been made by Congress?

We submit very earnestly that the existence of said compulsory conditions, justifying a slight variation from the selected route, at the same time and by the same justification preserved the right of way in its entirety, and that it would be error to hold the contrary. The principle being admitted, that there is a right to so vary the constructed road, and it follows that the purchaser of the land across which such variation puts the road must be held to have had the same notice and liabilities within the possible limits of such legal variations as he had before definite location, and he should not be authorized to make the company pay for the right of way. It seems to us to be both unlawful and inequitable.

Finally, the prior holdings of this Court, that the grant of a right of way takes effect on construction of the road and passage of the granting act, seem not to have been considered in said Railroad *vs.* Cook decision.

But, should this Court adhere to its decision in the Cook case, we infer from that decision that it would be upon the ground that in that case it did not appear that any reason existed which under the general practice would justify the variation.

We do not notice that such a reason is given among the recited facts, and if the change of line was made from mere

caprice, or without sufficient justification, our objections to the conclusion in that case would disappear, and we would expect the full, and as we regard it the well-established, doctrine to be stated and deferred to in the case at bar.

And we ask that this be done, for it would seem obvious that an unqualified ruling, like that in the said case, standing without explanation, would unsettle citizens in respect of rights and adjustments which were theretofore regarded as concluded, and would probably result in much litigation without sufficient cause or any real grievance.

THE REPORT OF THE COMMISSIONERS APPOINTED BY THE PRESIDENT UNDER SECTION 4 OF THE GRANTING ACT OF JULY 2, 1864.

Said section 4 requires examination and report, upon completion of certain sections of the railroad:

"If it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the Commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road."

If the right to lands and the right of way be dependent on the same act, to wit, the definite location, and adherence to it in construction, then the report of said Commissioners is material on the point in question in the case at bar, for it must relate to the construction "as in all other respects required by this act."

On page 25 of Transcript is that part of the Commissioners' report relating to this matter, as follows:

"LOCATION OF THE ROAD.

"After a thorough examination, we find that the line is so located as to serve the purposes both of a central and con-

venient channel for the trade and travel of the country through which it passes, and that proper regard has been paid to future as well as to present needs of local and also of through traffic."

And on page 29, Transcript:

* * * "We find its construction and equipment throughout to be in accordance with the instructions furnished for our guidance by the Interior Department, and we therefore respectfully recommend the acceptance of the road by the Government."

In view of the foregoing requirement of section 4 of the granting act; of the report of the commissioners, and of the evidence on pages 31, *et seq.*, of Transcript, as to the necessity for the variation in construction which took the road across the tract in controversy at a time when the full title to it was in the United States, we regard said matter of consequence, and a very important aid to the ascertainment of the fact, whether the variation was only such as the law and practice allowed, for it was either a legal adherence to the line of definite location, or the report of the commissioners under said quoted statute was erroneous, and if the former, then the contention of defendant in error fails, because of the finding of fact by officers of the Government appointed by law to ascertain and determine the facts.

We have presented herein our view of the law which should prevail, and we leave the discussion of all other points to the regular counsel-in-chief of the company.

C. W. HOLCOMB,

For the Northern Pacific Railroad Co.

No. 93.

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NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH,

Defendant in Error.

Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

H. F. STEVENS,
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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

In controverting as we do, to some extent, the statement of facts set out in brief of counsel for plaintiffs in error, we expressly disclaim any purpose to charge an intentional misstatement by him but attribute the errors which we assert to exist therein to the fact that he has but recently become connected with the litigation and that the agreed statement of facts upon which the case was tried and determined the last time at the circuit and which was prepared by his predecessors, is somewhat meager upon the points in respect to which the unintentional errors have occurred. But as we deem them

vital we take the liberty of here calling attention to them and also of supplementing the statement by the addition of other facts which we consider material.

In the first place, upon page 1 of his brief, referring to the property in dispute counsel says, "in fact, it is, and has been since the construction of the Northern Pacific Railroad, occupied by the main and yard tracks of that road in Bismarck." Nothing of the kind appears in the record and it is not true in fact. Upon the first trial, which was to a jury, the contrary expressly appeared and it was shown, without contradiction that none of the tracks were *ever* upon any portion of these premises, but that the same have been chiefly occupied by business blocks and stores belonging to tenants of the company.

The present record contains nothing upon the subject except as follows. (Trans. Findings of Fact, p. 16):

> "In the year 1873 the railroad was constructed across this *tract*, (referring to the 80-acre tract upon which the town of Bismarck was platted) and has since remained and been operated upon it. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map, filed to definitely fix this line, and have been occupied by the defendant, *through its tenants*, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes."

In the second place, counsel says, upon page 3 of his brief:

> "*Note* that no selection or entry was made by the *Town* authorities, and no proceedings instituted in the land office (so far as the record shows), prior to patent July 21, 1879."

And again on the same page he says:

> "The entry in the land office on which that patent was based was made September 14, 1876."

We submit that the record nowhere shows when the entry was made, further than by the statement in the findings of fact (Trans., pp. 15 and 16), that it was entered "under the town-site act (R. S. sec. 2387)" and "the eighty (80) acre tract on which these lots were situated was selected as the location of a portion of this town-site and surveyed prior to June 20th, 1872. * * * By the first of January, 1873, thirty buildings had been erected on the town-site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. * * * It was upon the town-site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based."

In the third place, counsel says, upon page 3 of his brief, "During 1872 some grading was done on the main line." The record states, (Findings of Fact, Trans., p. 16):

> "During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one quarter of a mile west of the west line of this 80-acre tract, extended south to its intersection with the grading."

In the fourth place, counsel says, upon page 3 of his brief:

> "During 1872 the company staked out a line across the *property* in question substantially where the track was afterwards built. This line was graded in 1873, and in June, 1873, the track laid where it has ever since been."

The record states, (Findings of Fact, Trans., p. 16):

> "During the year 1872 there was a line staked out across this *tract*, (the 80-acre tract above referred to—*not the property in question*) *substantially* where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873

the railroad was constructed across *this tract*, and has since remained and been operated upon it."

In the fifth place, the abstract by counsel, upon page 4 of his brief, of the complaint and demurrer in the action seems to us to inadequately present the question of estoppel. They are given in full in the record (Trans., pp. 12, 13) and we invite special attention of the Court to the particular language of each and to the discussion thereof hereinafter contained.

In the sixth place, counsel quotes, upon pages 5, 6 and 7, of his brief, sections 2 and 3, as being the only material parts of the charter of the railroad company. In our opinion other sections and parts of sections are material, and we quote them as follows:

> Sec. 1. "* * * And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound. * * *"
>
> Sec. 2. "And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation

within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

Sec. 3. "And be it further enacted, that there be and is hereby granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time *the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.* * * *"

Sec. 4. "And be it further enacted, that whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to, the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with said completed section of said road. * * *"

Sec. 5. "And be it further enacted, that said Northern Pacific Railroad shall be constructed in a substan-

tial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform guage shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. * * *"

Sec. 6. "And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company as provided in this act. * * *"

Sec. 7. "And be it further enacted, that the said 'Northern Pacific Railroad Company' be, and is hereby authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road; * * * And in case the owner of such lands or premises and the said company can not agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners. * * * And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of said railroad, and may institute proceedings, in manner de-

scribed, for the purpose of ascertaining the value of, and of acquiring the title to, the same."

Sec. 8. "And be it further enacted that each and every grant, right and privilege herein are so made, and given to, and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six."

Sec. 9. "And be it further enacted, that the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

Sec. 15. "* * * And the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road."

Sec. 17. "And be it further enacted, that the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon, said company by the congress of the United States, by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or asistance, to its own use for the purpose aforesaid."

Sec. 18. "And be it further enacted, that said Northern Pacific Railroad Company shall obtain the consent

of the legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature."

The following statutes are also deemed material to the determination of the case;

(R. S. U. S. § 1851.)
"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interferring with the primary disposal of the soil."

(Revised Codes of Dakota, 1877) § 168.
"The legislative assembly can pass no law interfering with the primary disposal of the soil."

Id. § 298. "The judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action."

Id. § 581. "Occupancy for any period confers a title sufficient against all except the territory and those who have title by prescription, accession, transfer, will or succession."

Id. 635. "Ejectment. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Id. 638. "Joinder of defendants. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff he may have a writ for the possession of the premises, as against the defendants in the action against whom judgment has passed."

U. S. R. S. Sec. 2288. "Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the homestead law, or

any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes *or for the right of way of railroads* across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their pre-emptions or homesteads."

Rule 8 of this Court provides for the transmission here of "a copy of the opinion or opinions filed in the case." Notwithstanding this rule, the opinion of the Circuit Court of Appeals, upon the first appeal in this action, and which covers the more important of the questions involved, appears not to have been transmitted. We therefore give it in full as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

Eighth Circuit.

No. 201.—May Term, A. D. 1893.

PATRICK R. SMITH,

Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of North Dakota.

Mr. H. F. Stevens, for Plaintiff in Error.

Mr. Fred. M. Dudley (with whom upon the brief was Mr. J. H. Mitchell, Jr.), for Defendant in Error.

Before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge.

Sanborn, Circuit Judge, delivered the opinion of the Court.

The principal question in this case is whether, as against one holding title under a patent of the United States which contains no reservation of right of way to the company, the right of way granted to the defendant, the Northern Pacific Railroad Company, by the act of Congress entitled, "an act granting lands to aid in the construction of a railroad and telegraph line

from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, (13 Stat., ch. 217, p. 365,) attached to a tract of land two hundred feet in width on each side of its railroad as actually constructed where the railroad as constructed crosses the land in question but the line of its definite location shown on its map filed for that purpose with the Secretary of the Interior and accepted by him does not cross it but passes about two miles south of it.

The property in controversy is eight lots in the City of Bismarck, in North Dakota, which were a part of an eighty-acre tract of land that was entered by John A. McLean, as mayor of that city, in behalf of its inhabitants, under the Townsite Act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21, 1879. The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff. The eighty-acre tract on which these lots are situated was selected as the location for a portion of this townsite and surveyed prior to June 20th, 1872. In the year 1872, the attorney of the Lake Superior and Puget Sound Land Company —the company that first made this selection—commenced, and thereafter continued, to sell lots upon this townsite according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the Register of Deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the townsite, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the townsite thus selected and the plat thus made, which were afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and it contained no reservation of any right of way to the Northern Pacific Railroad Company.

On February 21, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri River. This route passed about three-quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, and he accepted, its map fixing the definite location of its line. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872, grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872, there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873, the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line. Upon these facts the court below instructed the jury that the lots were subject to the right of way of the company and directed a verdict in its favor on that ground.

Section two of the charter of the Northern Pacific Railroad Company provides:

"That the right of way through the public lands be, and the same hereby is, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; * * * said way is granted to said railroad to the extent of two hundred feet in width on

each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations." 13 Stat., ch. 217, p. 367.

Section three of this charter contains a grant to the company of "every alternate section of the public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

Section four provides that whenever the company shall have twenty-five consecutive miles of its railroad and telegraph line ready for use, the President shall appoint three commissioners to examine it, and if they find and report that the twenty-five consecutive miles have been properly constructed, "patents of the land as aforesaid shall be issued to the said company, confirming to the said company the right and title to the said lands situate opposite to, and coterminous with, said completed section of said road." This act was approved July 2, 1864.

That the grants of the right of way and of the lands in aid of the construction of this railroad were grants in praesenti; that they vested in the company the present right to the lands and easements thus conveyed; that these grants were afloat and attached to no specific land until the line of the road was "definitely fixed," and that whenever the line of the railroad was "definitely fixed" the selection of the lands and of the right of

way was thereby made, and the right to lands and easements thus selected vested in the company as of the date of the approval of the charter, are propositions now too well settled to admit of discussion. Railroad Company v. Baldwin, 103 U. S. 426; Grinnell v. Railroad Company, 103 U. S. 739; Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629: St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad Co., 139 U. S. 1; Sioux City & I. F. Town Lot and Land Co. v. Griffey, 143 U. S. 32.

It is also well settled that so far as the land grant is concerned the line of the railroad was "definitely fixed" by the filing with, and acceptance by, the Secretary of the Interior of the company's map of its line of definite location. The company thereby exhausted its right of selection and so firmly anchored the land grant to this fixed line of its own choosing that it could not thereafter change or vary it without legislative consent so as to affect titles accruing thereunder or in any way affected thereby. Thus in Van Wyck v. Knevals, 106 U. S. 360, 366, Mr. Justice Field, in delivering the opinion of the Court, said:

"The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

In Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 634, Mr. Justice Miller, in delivering the opinion of the Court, said:

"The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is in law bound to report its action by filing its map with the commissioner, or rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party."

And in Sioux City & I. F. Town Lot and Land Co. v. Griffey, 143 U. S. 32, 39, Mr. Justice Brewer, delivering the opinion of the Court, said:

"The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the Government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the land grant are concerned, is its line definitely fixed; and it cannot thereafter, without the consent of the Government, change that line so as to affect titles accruing thereunder."

These decisions seem to be broad enough in terms and positive enough in language to settle the question here presented. But it is said that the question now before us involves the limits of a right of way and that the decisions referred to were rendered in cases involving land grants in aid of the construction of railroads. This is true, but it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed under the act of congress by filing its map of definite location and yet be subject to another and subsequent definite fixing on a different line by its actual construc-

tion, for this is simply to say that a line which is "definitely fixed" is indefinitely changeable; nor is it perceived how this act of Congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant and another and a parallel line for the purposes of its right of way.

It is said that the grant of the right of way reads, "said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain," while the grant of lands in aid of the construction reads "to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land on each side of said railroad when it passes through any state," and hence that the former grant refers to the constructed railroad and the latter to the line of definite location on the map. But this argument is hypercritical. It proves too much. It proves that the land grant itself is to be measured from the line of definite location fixed on the map in the territories and from the constructed railroad in the states, for the grant is of twenty alternate sections "on each side of said railroad line" in the territories, and ten alternate sections "on each side of said railroad" in the states. The fact is that the words "railroad" and "railroad line" are here used interchangeably as synonymous terms and no special significance attaches to the use of the one or the other.

It is said that the completed railroads frequently deviate from their lines of definite location as fixed upon their maps on account of unforseen obstacles to construction, that Congress must have known this fact and must have intended that this right of way should follow the constructed road and not the

line fixed upon the map. Conceding the existence of the fact of the frequent deviation of railroads from their fixed lines and that Congress was aware of this fact it made ample provision for this deviation in section seven of the act by giving to this company the power of eminent domain. The company was given the power to condemn its right of way whenever it desired to deviate from its fixed line. On the other hand, there are many provisions in this act that indicate that it was the purpose of Congress to have the railroad actually constructed on the line the company fixed by this map and to limit the right of way granted to the two hundred feet on each side of that line. It was in the contemplation of Congress when this act was passed that this company would first file a map showing its general route, that upon the filing of this map the lands within forty miles of the route thus indicated should be withdrawn from entry for homesteads, from preemption and from sale by the Government until the company could survey, select and definitely fix the line on which it proposed to build its railroad. (Section 6.) The company filed the map of its general route through Dakota Territory east of the Missouri River in February, 1872, but it did not file its map of the definite location of its line until May, 1873. Why was this delay contemplated, and why was the line of the railroad required to be "definitely fixed" by a public record made and filed by the company? In our opinion there were at least three objects to be accomplished by the filing of this map: First—That there might be a public and permanent record of the fixed line of this railroad and thus of the limits of its right of way; Second—That the definite location of the line of the railroad might be known to the Secretary of the Interior and furnish the call for his adjustment of the land grant; and Third—That the date of the filing of this map might furnish a date for the determina-

tion of the validity of pre-emption, homestead and other rights. If the sole or main purpose of the map of this line of definite location was to furnish a call for the land grant or a date for the determination of the validity of rights that had accrued, and it was the intention of Congress that the railroad when actually constructed and the right of way granted might be located elsewhere, no accurate survey, no great delay was necessary. The exact limits of the land grant twenty miles distant from the line of the railroad were of little importance. They might have been fixed without material loss to the company by any engineer, without leaving his office, by drawing a straight line upon a map of the country from some fixed point upon the Red River of the North to another on the Missouri River, and certifying that as the fixed line of the railroad. But the main purpose of requiring this line to be definitely fixed was not only to furnish a call for the land grant, but also to provide a permanent record of the line of the railroad and the limits of this right of way. Hence it was that some delay in definitely fixing the line was contemplated. Congress intended that the engineers of the company should have ample opportunity to carefully survey the practicable lines of construction along the general route, to discover any obstacles to the construction of the road on these lines and avoid them, and when all this was done that the company should definitely fix its line of railroad, that it should irrevocably choose, and by filing its map of definite location announce its choice of the line on which it elected to construct its road, and along which it would exercise the right of way and the right to the necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn tables and water stations granted to it. It was vital to the success of the enterprise that the limits of this right and the location of these grounds

should be carefully selected. A line of construction definitely fixed without careful preliminary surveys might be ruinous to the company. All this the company undoubtedly fully appreciated. It appreciated the purpose and effect of definitely fixing this line. It took ample time to make experiments and accurate surveys of many lines and to make a careful and wise selection. It did not file its map showing the definite location of its line until May, 1873; until more than a year after its general route had been selected. It did not file this map until after it had carefully chosen and surveyed its line and partially graded its railroad upon it past the townsite on which the lots in question are situated. The selection was made by its own officers in its own time, after every opportunity had been afforded it to make a satisfactory choice, and we think it exhausted the right of selection given by the act of Congress and definitely and irrevocably fixed the line of this railroad and the limits of the right of way granted to it as against third parties holding under patents of the United States.

It is said that the decision and report of the commissioners appointed under section four of the act, that the railroad and telegraph line of the defendant had been completed in good, substantial and workmanlike manner and as in all other respects required by the act, and the approval of that report by the President, constitute a judicial determination that this railroad was constructed where it should be; that this is the decision by a special tribunal of a matter confided to it; that it cannot be attacked collaterally, and that as the United States have waived all objection to the location of the constructed road, the plaintiff holding under them cannot attack it. But the question now presented is not whether the railroad company had twenty-five consecutive miles of railroad and telegraph line ready for the service contemplated when these com-

missioners reported, but whether the right of way granted to the defendant was limited to the two hundred feet in width on each side of the line of railroad "definitely fixed" by its map and partially graded, or whether it extended over a tract two hundred feet in width on each side of the line of railroad on which it is now operating, two miles north of and parallel to its fixed line. This question never was confided to the commissioners for their determination and never was decided by them. The question they were authorized to consider and determine was whether or not the railroad and telegraph line were constructed in a substantial and workmanlike manner so that they would be serviceable for the purposes of their construction, whether they were "ready for the service contemplated," not whether the title of the company to the lands on which they were constructed was obtained by the grant of the right of way or by the exercise of the power of eminent domain or had not been obtained at all. Moreover, if there was any commissioner or tribunal charged with the duty of determining the question now presented, it was the Commissioner of the General Land Office, and his issuance of the patent to the land in dispute to the plaintiff's grantor without any reservation of the right of way to the defendant would be a conclusive adjudication that these lands were not subject to any such right of way. (Quinby v. Conlan, 104 U. S., 420; Smelting Co. v. Kemp, 104 U. S., 636). It is unnecessary to consider in this case what effect, if any, the action of the commissioners who examined this railroad and of the President who approved their report would have if the question regarding this right of way arose between the company and the United States alone, and we express no opinion upon that question. But as against this plaintiff holding under a patent issued by the United States to his grantor without any reservation, when the public record made by the

company of the definite location of its line two miles south of this land remained unchanged and without amendment, we are clearly of the opinion that such action was without any effect.

It is said that the right of way granted by this act should be held to extend for two hundred feet on each side of the center line of the main track of the railroad as originally constructed. It is not claimed that this right of way has been swung to the north and to the south from time to time as the company has since changed its main track, as it must frequently have done, especially in large cities where it has many tracks. It is not claimed that the company has ever amended its map of the definite location of its line to show where the line originally constructed was, or that there is any public record anywhere from which its location and the limits of this right can be learned. The only way these can be discovered now is from the testimony of the few witnesses who have knowledge of where the main track was laid twenty years ago, and the death of these witnesses will soon compel a resort to evidence still less reliable. Lots and lands in this country are bought and sold on the faith of the public records. If this right of way is not anchored to the line fixed by the map of this company, the record of that map must prove a constant snare to purchasers of lands near this railroad. It is no answer to this position to say that the railroad is visible on the land it traverses because it is common knowledge that lands are frequently bought and sold without a view of the premises, and because no view of the premises now could determine where the main track was twenty years ago. We are unable to pursuade ourselves that Congress ever intended to leave the location and limits of this right of way so undefined and undefinable.

After the most careful consideration of this case we are unable to find any reason for the rule adopted by the Supreme

Court that the line "definitely fixed" by the map furnishes the only call for the adjustment of the land grant, that is not equally cogent and convincing to prove that it also furnishes the call for determining the limits of the right of way. If it does not do so, the filing of the map does not "definitely fix" the line of the railroad at all, but leaves it indefinite and liable to be changed by the actual construction of the road. It was not essential to the adjustment of the land grant that the line of the purposed road should be definitely fixed after careful surveys, but it was vital to the interests of the company in its right of way and its right to grounds for buildings and improvements that its line should be carefully selected and definitely fixed where the railroad could be economically constructed upon it. Patents issue to the company for the lands granted after the adjustment of the grant, and the map of definite location grows less valuable as a muniment of the title to these lands, but no patents issue for the right of way and the only record that defines or evidences the limits of that right is this map. It is of paramount importance that there should be a public record accessible to all from which the extent and limits of this right may be ascertained. It would be intolerable that so valuable a right should be disconnected, as defendant's counsel claim it is, from the line definitely fixed by the map of the company, should attach itself to the center line of the main track of the railroad as originally constructed twenty years ago, and should have no muniment of title but the uncertain memory of witnesses of its construction to fix its limits.

The result is, that as against one holding under a patent of the United States without reservation, the right of way granted to the Northern Pacific Railroad Company by the act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route,"

approved July 2, 1864 (13th Stat., ch. 217, p. 365), is limited to two hundred feet in width on each side of the line of railroad "definitely fixed" by the company's map of definite location filed May 26, 1873, and as the lots in question were not within these limits they were not subject to the defendant's right of way, and it was error for the Court below to instruct the jury to return a verdict in its favor.

It is unnecessary to notice other assignments of error because the questions presented by them may not arise on a second trial. The judgment below is reversed with costs, and the cause remanded with instructions to grant a new trial.

Filed October 16, 1893.

A true copy.

Attest:

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

It is conceded, as we understand, by counsel for plaintiffs in error, that the statement upon page 19 of his brief, as follows: "Here the railroad company in the former action, as it had a right, made a specific allegation in its complaint that it was the corporation created under the act of July 2, 1864, and that the premises in question were by that act granted to it by the United States as part of its right of way," is an inadvertance. There was no such allegation.

ARGUMENT.

QUESTION OF TITLE.

The grading of the line, followed by adoption of the same as the line of its definite location and the filing and acceptance of the plat thereof by the commissioner of the general land office. May 26, 1873, definitely and finally fixed the right of way of the plaintiff in error and exhausted its rights in the premises, as against one holding under patent of the United States.

We have some doubt as to the necessity, if not the propriety, of discussing and supporting by other authorities propositions which, as we understand it, have been finally and completely established by recent decisions of this Court. We understand that the three cases of M. K. & T. Ry. v. Cook, 163 U. S. 491, Hardy v. Johnson, 1 Wall. 371, and Cromwell v. County of Sac., 94 U. S. 351, settle every question involved in this case, and we do not expect that the numerous authorities which we have cited will be useful otherwise than as furnishing instances in which the doctrines established by those decisions have been applied. But, inasmuch as counsel for plaintiffs in error has set us the bad example, we are impelled to follow it. Whether or not the case of Missouri, Kansas & Texas Railway Company v. Cook, was argued orally in this Court for plaintiff in error, it is apparent from an inspection of the briefs of counsel in that case, that the matter was fully presented to and considered by the Court, and the opinion leaves nothing to be said, except to apply the rules there established to the case at bar.

In the brief for plaintiff in error in that case, all the authorities quoted by counsel for plaintiff in error here were quoted more fully, and many more authorities were cited than are contained in his brief.

An attempt is made, however, to distinguish that case from

the case at bar, chiefly because of alleged difference in situation of the adverse party at the date of change of location of the railroad. That there is a distinction between the cases we admit, but we think it is in our favor. The statute in question in the Cook case (14 Stat. 289), although it refers to the "time when the line of said road is definitely fixed," did not, as does the Northern Pacific act, expressly, provide for *first* fixing, the *general route*, upon a map of which the lands granted in aid were to be withdrawn from entry, and, *second*, a filing of a map of *definite location*, after the line was definitely fixed, but only for one map, and the provision in that respect was as follows: "That as soon as said company shall file with the secretary of the interior maps of its line, *designating the route thereof*, it shall be the duty of said secretary to withdraw from the market the lands granted by this act." The grant of right-of-way was in the identical language of the Northern Pacific act, "Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain." It appeared, however, that a line was surveyed and a map thereof filed, from which the granted lands were withdrawn from market. The court, Mr. Chief Justice Fuller, delivering the opinion, say:

> "In the instances of many of the land grants, the acts contemplated a preliminary designation of the general route by map filed in the department of the interior, upon which the lands were withdrawn, but the grants only took effect on a subsequent designation of the definite location of the line of the road. Railway Co. v. Dunmeyer, 113 U. S. 629; U. S. v. Southern Pac. R. Co., 146 U. S. 570. But this grant made no provision for any preliminary surveys and maps, and the only map provided for was that mentioned in section 4, being, as stated, a map of 'its line designating the route thereof.' We think that, by the filing of the map of the line sur-

veyed, the route was definitely fixed, within the intent and meaning of the act; and, while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court."

In thus deciding, the court evidently adopted the rule which, as will hereafter appear, had often been applied to such grants, of resolving any doubtful provisions against the grantee, and held that, inasmuch as the act contemplated that the line of the road should be "definitely fixed," and the filing of a map of the line, "designating the route thereof," and did not provide for the filing of any other map, it was *reasonably to be inferred* that "it also operated, and could not otherwise than operate to definitely locate the line and limits of the right of way."

But in *this* case we have express reference in section 6, (*ante.* p. 6) to *first fixing* the *general* route, and in section 3 for the *definitely fixing* of the line of the road, and the filing of a map thereof. Is not that which was *reasonably inferred* from the act in question in the Cook case, *necessarily implied* from the language of the Northern Pacific act?

Counsel at page 15 of his brief, after quoting from the opinion of the court in the Cook case, "The same conclusion necessarily followed in respect of the right of way," asks "why necessarily followed?" Without intending to imply that the opinion itself does not sufficiently answer this question, we take the liberty to suggest as follows:

The grant of lands in aid was (*ante*, p. 5) of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on

each side of said railroad line as said company may adopt," not previously disposed of or reserved "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office."

This, surely, contemplated that when the plat was filed it should be certainly known what lands passed to the company under its grant in aid and what became open to settlement. Does it not as *surely* and *necessarily* follow that it should be certainly known at the same time what lands passed to the company under its grant of right of way and what became open to settlement and improvement, free from that right of way? *More necessarily*, we assert, because, at all times, it was known that *even-numbered* sections were open to settlement out of the territory of the lands granted in aid, both before and after the plat was filed, but, as to the right of way, there was no such assurance until that plat was filed, and not a house or store or factory could be erected or a street laid out without liability of dispossession when that plat should be filed, and this reason was succinctly and sufficiently stated by the court when it said, in the Cook case:

> "The grant of the lands and the grant of the right of way were alike grants *in praesenti*, and stood on the same footing; so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right-of-way for the proposed road. The easement and the lands were afloat until, by definite location, precision was given to the grant and they became permanently fixed."

The conclusion also "necessarily followed" from the unambiguous language which the court had just quoted from the opinion in the case of Van Wyck v. Knevals, 106 U. S. 360, as follows:

> "The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route."

It likewise "necessarily followed" from the plain meaning of the words employed in the act, as stated by the Circuit Court of Appeals, (*ante*, p. 15):

> "It is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed under the act of congress by filing its map of definite location and yet be subject to another and subsequent definite fixing on a different line by its actual construction, for this is simply to say that a line which is "definitely fixed" is indefinitely changeable; nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant and another and a parallel line for the purposes of its right of way."

No better illustration of the propriety of such a holding could be given than is afforded by the case at bar. Here it appears (Findings of Fact, Trans., p. 16) that on February 21st, 1872, the company filed a map of its general route, which pass-

ed about three-quarters of a mile south of this eighty-acre tract, which "was selected as the location of a portion of this town-site and surveyed prior to June 20, 1872. * * * That by the first of January, 1873, thirty buildings had been erected on the town-site, *and from that time until the patent issued the population of the city and the improvements in it continued to increase.*" Of course the improvements made prior to filing the map of definite location were made subject to risk of dispossession, should the line indicated by that map prove to be upon the land thus improved. But all improvements made *after that date* must be presumed to have been made upon the faith of that location, and this court will presume, if necessary, in support of the judgments of the courts below, and the presumption arising from the issue of the patent, and in the absence of anything in the record to the contrary, that the rights of defendant in error attached at the proper time.

As to the claim of counsel that this case is to be distinguished from the Cook case, because there it appeared that the entry in the local land office was made intermediate the filing of the plat and the change of location, while here, as he claims, at page 18 of his brief, "the road was built on the ground where it now is and the right of way was in the possession of the company, trains had been running over it for many years before the entry was made and patent issued under which defendant in error claims," we have to say as follows:

In the first place, we submit that there is nothing in the record to show when the entry was made, but it does show that possessory rights attached to this eighty-acre tract before the change of location, and in Ashby v. Hall, 119 U. S. 526, the court in a

case involving this "Town-site Act" (R. S. § 2387) distinctly recognized the existence of such possessory rights, saying: "*The plaintiffs and their predecessors in interest had made valuable improvements upon the lots, to which they held a possessory right at the time of the entry of the town-site*" and "The act required the entry of land settled upon and occupied, to be in trust 'for the several use and benefit of the occupants thereof according to their respective interests.'" Unlike a homestead or pre-emption claim, where the *entry* is the inception of the right, an entry under the townsite act is only a step in the line of perfecting rights thereunder, and the issue of the patent precludes a denial that those rights existed.

In the second place, counsel has again confounded the location of the tracks, "across this tract" (80-acre tract) with the premises in question, which lie *north* of the tracks *and upon which no portion of the tracks is or ever was located.* (See *ante*, p. 2.)

In the third place, whatever may be the difference in respect to time of attaching of rights of defendant in error, the Cook case expressly holds that "the issuing of the patent shows that the land department had found the existence of all the conditions, such as actual occupancy of and residence on the premises and like matters requisite thereto, and it took effect by relation as of the date of the certificate." (In this case under the "town-site act," from the commencement of occupancy). "It follows that, as the rights of the settler were acquired after the right of way of the road had been *definitely located*, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain."

Counsel claims another distinction between that case and

this, on the ground that "the stipulation of facts in that case contained this clause: 'But the route of said road on its present location has never been approved by the President of the United States, unless such approval is shown by the other facts herein admitted.' There were no facts stated in the stipulation which showed any action by the President approving the constructed line," while section four of the Northern Pacific act (*ante*, p. 5) provided for such action, which was taken in respect of the portion of the constructed road here in question. This argument, however, is fallacious, because it appears from the opinion in the Cook case that, at the date of the passage of the act there construed (14 Stat., 687), the land there in question was part of an Indian reservation, and was not ceded to the United States until the following year; wherefore, it was, in that act, with great propriety,

"provided, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States."

Thus, in that case, the grant of the right of way was, in express terms, and for an obvious reason, made subject to the approval of the treaty-making branch of the government. In the case at bar no such provision was made, and no such reason existed as we shall hereafter endeavor to show.

Let us, for a moment, divest this case of its technicalities and consider it as if it were an ordinary transaction between two individuals. Let us suppose that A, owning a large tract

of land, grants to B a right of way, 20 feet wide across A's land, upon a line to be selected by B, upon condition that B, within a specified time constructs and thereafter maintains thereon a first class wagon road, and, by the same instrument, grants him every alternate 40 acre tract within 2 miles of the road and agrees to convey it coterminously with the construction of the road, except such as A might sell to others or reserve for watering places, before B had located his road and filed a plat of the definite location thereof in the office of the register of deeds. That would be a grant of a right of way upon two *express* and one *implied* condition, viz.: 1. That B should select the line of the road. 2. That he should construct and maintain it, and 3. That B should file the plat. It would also be a grant of lands *with* reservations and exceptions. The first grant would be *without* reservation or exception *as to the route B might select*, but it would not be without limit as to the *number* of routes he might select. Would the court hesitate to so construe the instrument? That such a construction must be given has been repeatedly held.

And, if that would be the case between two individuals, where the rule is to construe the grant most strongly against the grantor, what difficulty should there be in arriving at the same conclusion with respect to a government grant, which is to be construed most strongly against the grantee?

The following cases well illustrate the application of the doctrine of *election*.

> "As to the location of the gates, we have seen that defendant has a discretion; it may elect, in its discretion to locate them at one point or another, but the election being made, the discretion is determined and the gates become fixed and immovable. In such case the doctrine of election applies in full force. The defendant has been permitted to locate its gates at its discretion; to that it was entitled. But the charter does not permit it

to change their location. It is to the interest of the public that they be permanent, and in case of election the rule is 'if a person once determines his election, it shall be determined forever.' Com. Dig., title 'Election,' ch. 2, Co. Litt. 145a; State v. Turnpike Co., 10 Conn., 163; Turnpike Co. v. Hosmer, 12 id. 364; Griffin v. Horn, 18 I. R. 397."

L. & N. Turnpike Co. v. N. & K. T. Co., 2 Swan (Tenn.) 282.

"The charter authorizes the company to erect and establish a gate, that is, fix, settle or confirm it. It is, then, to be erected and permanently confirmed in the place these proprietors shall determine."

[In the case at bar the defendant was authorized (*ante*, p. 4), to "locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route *as shall be determined by said company.*"

"And in the year 1796 they did determine that it should be fixed or established at the iron works. It would seem, then, that they had completely executed the power and exhausted it. It is said further that it is to be placed where they shall judge it convenient; and that circumstances may make one place convenient at one time and another place at another time. But if it was intended that this should affect the power, nothing would have been more easy than to have added 'and the same vary from time to time, as convenience may require.' So far from this, the terms used do not import such an authority."

State v. Norwalk & Danbury Turnpike Co., 10 Conn. 157.

We now urge a careful examination of the pertinent provisions of the Northern Pacific act, bearing in mind two cardinal

rules of construction: 1. That an act is to be construed by considering together all of its parts and provisions and giving to language its ordinary meaning, and, 2. That grants of this character, if the language be doubtful, are to be construed most strongly against the grantee.

By section 1 the corporation was authorized and empowered to (1) lay out, (2) locate, (3) construct, (4) furnish, (5) maintain, and (6) enjoy a continuous railroad and telegraph line. Not only under established rules of construction are we to ascribe significance to each of these expressions, but their clear and unambiguous meaning and logical sequence are of controlling effect. The line was (1) to be "*laid out*" from Lake Superior to Puget Sound. This was prescribed in view of the provisions of Sec. 6, "that the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the *general route shall be fixed.*" The line was (2) to be "*located.*" This was in view of the provision in Sec. 3 as to "the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." The road was then (3) to be "*constructed*" This was in view of the provisions of Sec. 5, "that said Northern Pacific Railroad shall be *constructed* in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places and all other appurtenances, * * * with rails of the best quality, manufactured from American iron. And a uniform guage shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description." To determine whether the road had been so *constructed*, and for no other purpose, provision was made in Sec. 4 for the appointment and report of commis-

s'oners. It was then (4) to be "*furnished.*" This was in view of the provisions of Sec. 5, as follows: "Including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business." It was then (5) to be "*maintained.*" This was in view of the provision of Sec. 11, "that said Northern Pacific Railroad shall be a post route and a military road, subject to the use of the United States." It was (6) to be "*enjoyed.*" This was in view of the provisions of Sec. 13, conferring authority "from time to time to fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property on said road or any part thereof; and the provisions of Sec. 17, "to hold and enjoy any grant, donation, power, franchise, aid or assistance to its own use for the purpose aforesaid."

With respect to the right of way granted by Sec. 2, there is no dispute that it was a grant *in praesenti* of a right of way to be located by the company through lands which were then public. Although the grant of lands in aid is contained in a separate section (Sec. 3), it is apparent that Congress did not consider the subjects to be distinct in their character, for, in the last paragraph of Sec. 2, it is provided that the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to *all lands falling under the operation of this act, and acquired in the donation to the road named in this bill.*" Thus, in Sec. 2, relating chiefly to right of way, which measured less than 50 acres per mile, provision is made for the land-grant, which measured the vastly greater quantity of 25,600 acres per mile, while in Sec. 3, which relates chiefly to the land-grant, reference is made to "the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." But in view of the plain meaning

of the words, the fact that this provision is found in Sec. 3, and not in Sec. 2, no more renders it inapplicable to the right of way than does the fact that the provision as to extinguishment of the Indian titles is found in Sec. 2, and not in Sec. 3, render that provision inapplicable to the land-grant. As counsel for the plaintiff in error well says, at page 8 of his brief, "the country through which the Northern Pacific was projected to run was public land *inhabited largely by unfriendly tribes of Indians.*" What good would it do to extinguish their title to a strip 400 feet wide, so long as they continued their hostile occupancy of vast areas on both sides?

Nor is the significance which counsel ascribes to the use, in Sec. 2, of the words "where it may pass through the public domain," justified, when, under the settled rule of construction, the context is considered, for, as is well stated in the opinion of the Circuit Court of Appeals:

> "It is said that the grant of right of way reads, 'said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain;' while the grant of lands in aid of the construction reads, 'to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land on each side of said railroad when it passes through any state.' And hence that the former grant refers to the constructed railroad, and the latter to the line of definite location on the map. But this argument is hypercritical. It proves too much. It proves that the land grant itself is to be measured from the line of definite location fixed on the map, in *territories*, and from the constructed railroad in *states;* for the grant is of twenty alternate sections 'on each side of said railroad line' in territories, and ten alternate sections 'on each side of said railroad' in states. The fact is that the words 'railroad' and 'railroad line,' are here used interchangeably as synonymous terms, and no special significance attached to the use of the one or the other."

The fourth section provides for the appointment of commissioners, to examine and report to the President. We have already seen that the duty of these commissioners was limited to ascertaining and reporting whether the road had been *constructed* and equipped in the manner and of the materials specified in Sec. 5.

That location and construction were not deemed identical is further to be inferred from the power given the board of directors in Sec. 15, "to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road."

Sec. 7 confers upon the Railroad Company the power to exercise the right of eminent domain to the fullest extent.

To the claim that construction and not the filing and acceptance of the map of definite location defined the limits of the right of way, we answer by asking, How much construction? The road on the line of definite location was partly constructed. The report of the commissioners (Trans. pp. 26 and 27) shows that the road on the new line was not finished at the date of that report. Besides, where, in the act, is found the provision to that effect? Is it construction, followed by operation, that is to govern? If so, for how long? In the language of counsel for plaintiffs in error (brief, p. 14), "it should be a matter of common knowledge of which this Court will take notice," and was a matter of which the Circuit Court of Appeals (*ante*, p. 21) did take notice that, after construction and operation, changes in location are frequent. Where is the statute or rule that is to fix the extent of operation?

Counsel says that "if the decision below is to stand, it affords

good ground for controversy between every land grant road and every land owner along its line as to the boundary between them. We assert the very opposite. As stated by the Circuit Court of Appeals (*ante*, p. 21):

> "It is said that the right of way granted by this act should be held to extend for two hundred feet on each side of the center line of the main track of the railroad as originally constructed. It is not claimed that this right of way has been swung to the north and to the south from time to time as the company has since changed its main track, as it must frequently have done, especially in large cities where it has many tracks. It is not claimed that the company has ever amended its map of definite location of its line to show where the line originally constructed was, or that there is any public record anywhere from which its location and the limits of this right can be learned. The only way these can be discovered now is from the testimony of the few witnesses who have knowledge of where the main track was laid twenty years ago, and the death of these witnesses will soon compel a resort to evidence still less reliable. Lots and lands in this country are bought and sold on the faith of the public records. If this right of way is not anchored to the line fixed by the map of this company, the record of that map must prove a constant snare to purchasers of lands near this railroad. It is no answer to this position to say that the railroad is visible on the land it traverses, because it is common knowledge that lands are frequently bought and sold without a view of the premises, and because no view of the premises now could determine where the main track was twenty years ago. We are unable to persuade ourselves that Congress ever intended to leave the location and limits of this right of way so indefinite and indefinable. * * * It is of paramount importance that there should be a public record accessible to all, from which the extent and limits of this right may be ascertained. It would be intolerable that so valuable a right should be disconnected, as defendant's counsel claim it is, from the line definitely fixed by the map of the company; should attach itself to the center line of the main track of the railroad as originally constructed twenty years ago, and should

> have no muniment of title but the uncertain memory of witnesses of its construction, to fix its limits."

Counsel asserts that the *land department* has not required maps of definite location to be sufficiently accurate so that it could also therefrom define the right of way. We answer that beyond all question, for whatever purpose, *the act* requires it and this Court will not assume that a co-ordinate branch of the government has violated the law, nor will plaintiff in error be heard to say that it has done so. Besides, even if the claim could be asserted, "*Id certum est quod certum reddi potest.*" From the testimony of Messrs. Morris and Meigs, offered by plaintiffs in error, it appears that this line of definite location, made in May, 1873, after the public surveys were completed, is *mathematically precise.*

(Tran. p. 41, Testimony of Mr. Meigs, who fixed the line):

Q. I will ask you to read the question and answer, in the testimony of C. A. F. Morris, in this case, as follows:

'Q. Now, describe the survey of definite location of the line, as contradistinguished from the construction survey.'

Please read the answer following this, and state whether that is a correct statement of what was done with respect to the definite location of the Northern Pacific Railroad, as testified to by you?

A. I think it is. Mr. Morris seems to have described very accurately, the usual processes in railway surveys for construction."

(Trans. p. 33, Testimony of Mr. Morris):

Q. Now describe the survey of definite location of the line as contradistinguished from the construction survey?

A. The country lying between the points designed to be connected with the line of railroad is first carefully examined by the engineer placed in charge of such survey. He takes

notes of leading points that he designs to run by in the general direction of the proposed line, taking care to avoid all natural obstructions that should necessitate large cost and trouble to the company proposing to build the line. He then commences with his parties to run out by course and distance and stake out on the ground a proposed line, carefully noting all changes of courses, and taking the levels of lines as he proceeds, in order to enable him to judge of the feasibility of the line he has previously staked out. If the line is satisfactory, he takes field notes showing the general topography of the country adjoining and ties up or connects his line with the U. S. government surveys, if they exist in the locality, so as to enable him to make an accurate map showing his location and the natural features of the country through which the route runs, his stakes being placed at intervals of one hundred feet.

Q. Such line becomes a line upon the ground, does it not?

A. It does.

Q. Was not the line of definite location marked upon Exhibit "B" established in the manner you have just described?

A. It was."

Moreover, so far as this case is concerned, it is sufficiently definite, for it shows the line to be at least two miles south of the premises in question. This map of "definite location" affords the means, and the only means, of preventing, instead of engendering, the disputes which counsel deprecates. More than twenty years have elapsed since the last of these grants was made; more than twenty-five years since the road was begun, and more than fourteen years since "the last spike was driven," and yet less than six cases can be found in the books.

If it was important to know how the grant affected lands forty miles distant from the railroad, was it not much more im-

portant to know how it affected lands directly contiguous ~~and~~ when passing through future populous towns and villages?

It is no hardship to require of this company what the statutes of every state in the Union require of every railroad company which acquired its right of way or any portion thereof by condemnation, and what this same company would be compelled to furnish, and frequently has been compelled to furnish where it has proceeded, under the provisions of section 7 of this very act, to acquire right of way by condemnation, and that is to file in some public office, accessible to all who may at any time be interested, an exact map or statement of the limits of its right of way. Such maps or descriptions are invariably required to be filed in advance of construction, and we have yet to hear that such requirement has ever worked a hardship.

Not only to illustrate this point, but to show the construction which this railroad company itself placed upon the act of July 2nd, 1864, the case of Northern Pacific Railroad Company v. Jackman (6 Dak. Reports, 236), is instructive. From this it appears that in January, 1881, the railroad company filed in the district court of Burleigh county, Dakota Territory, a petition for condemnation of part of section 32 (which is the section adjoining that here in question), for the purpose of a right of way. While the statement contained in the report does not show all the facts, the original record discloses that the company relied upon section 7; evidently and correctly, as we claim, assuming that its right under the original grant of right of way had been exhausted.

Afterwards, in 1889, it resisted the application of Jackman, who was a pre-emptor at the date of the condemnation proceedings but whose title had meanwhile been perfected by patent, for the condemnation money.

In its petition in that matter the company alleges as follows:

> "That in the construction and working of said road it will be necessary for the plaintiff to have a tract of land 100 feet in width on each side of the center line of its said road through the S. W. ¼ of section 32 aforesaid, described as follows, to-wit: All of a certain strip of land in said quarter section within one hundred feet of the located center line of said railroad, the said line entering the said quarter section at a point 271 feet west of the southeast corner thereof, and running with magnetic bearing north 73 degrees 45 minutes west to a point 1,496 feet north of the southwest corner of said quarter section, and containing twelve and eighty-four one-hundredths acres as appears from the map of said line hereto attached and made a part hereof."

Counsel for the railroad company there also cited the Baldwin case, but the court held that the company, having proceeded to condemn under the statute, could not be heard to contest the validity of the award.

It is not claimed that this case has any bearing upon that at bar, further than to illustrate the reasonableness of the doctrine for which we contend, and that it appeared so to the defendant in error, which, in 1881, invoked it in its own behalf.

If, as counsel appears to apprehend, any considerable difficulty is liable to follow a proper construction by this court of the statute in question, it could easily be remedied by the voluntary act of the company in filing in the registry office of each county a map of the definite location of its right of way through such county, drawn with such precision as the testimony of Messrs. Morris and Meigs shows is practicable, or by acts of the legislature requiring the filing of such maps.

> "It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls

so far as limits are concerned, as if such descriptive features were written out upon the face of the deed of the grant itself."

Cragin v. Powell, 128 U. S. 691.

The act in question is to be construed by giving effect to the plain and unambiguous words "*definite location*," and by considering all of its parts and provisions. Repeated decisions of this court have sanctioned the doctrine thus expressed by Sutherland on Statutory Construction, (Sec. 239):

"The intention is to be ascertained by considering the entire statute. The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of every part. This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general design. A statute should be so constructed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose. If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. It is said to be the most natural exposition of a statute to construe one part by another, for that expresses the meaning of the makers; this exposition is *ex visceribus actus*. The words and meaning of one part may lead to and furnish an explanation of the sense of another. 'To discover,' says Pollock, C. B., 'the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the *actual language* of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other claus-

> es, *may reasonably and obviously be drawn.* * * * If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If, after all, it turns out that that can not be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

Grants of this character, if the language be doubtful, are to be construed most strongly against the grantee. This rule was applied to this very charter in the recent case of Barden vs. N. P. R. R. Co., 154 U. S. 288, in which Mr. Justice Field, delivering the opinion of the court, said:

> "The language of the grant to the plaintiff is free from ambiguity. The exclusion from its operation of all mineral lands is entirely clear, and, *if there were any doubt respecting it,* the established rule of construction applicable to statutes making such grants would *compel a construction favorable to the grantor.* * * * The patent was in law a declaration that minerals did not exist in the premises when it was issued. * * * The *grant under consideration is one of a public nature. It* covers an immense domain, greater in extent than the area of some of our largest states, *and it must be strictly construed.* It would seem, from the frequency with which we have announced this doctrine, that it should be forever closed against further question. * * * In Leavenworth L. & G. R. Co. v. U. S., 92 U. S. 733, this court said: 'The rules which govern the interpretation of legislative grants * * * apply as well to grants of lands to states to aid in building railroads as to *grants of special privileges to private corporations.* In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object, the accomplishment of which it desires to promote, but declines to undertake. * * * If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings,—*one of extension, and one of limitation,—they must be accepted in a sense favorable to the grantor.*' "

> "In construing a public grant, as we have seen, the intention of the grantor, *gathered from the whole and every part of it*, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive the benefit of them."
>
> Leavenworth etc. R. R. Co. v. U. S. 92 U. S. 733, p. 746.

The propositions for which we contend, as we understand it, are established by the decision in the Cook case, and we have endeavored to show that there is no practical distinction to be made between them, but counsel now asks the court, even if it should so conclude, to overrule that case on the ground that it is in conflict with the case of R. R. Co. v. Baldwin, 103 U. S. 426.

We find no such inconsistency between the Cook case and the Baldwin case as counsel for plaintiff in error claims to exist.

Our proposition which, as we assert, is established by the decision in the Cook case, is that the defendant's charter contains two distinct grants, differing only in that one (that of lands in aid) contains exceptions or reservations as to the public lands which should fall under its operation *when the line was definitely located;* while the other (that of the right of way) is without exception or reservation as to the public lands which should fall under its operation *when the line was definitely located.*

The Baldwin case, and all other cases cited by counsel in support of his contention, establish, and do not controvert, that proposition. But he seeks to go further and deduce therefrom the doctrine that in respect of the right of way the grant is not only without exception or reservation as to the public lands which should fall under its operation *when the line was*

definitely located, but should continue without such exception or reservation after such definite location, and until the line is finally constructed and completed. We submit that neither the Baldwin case nor any other case to be found in the books supports that contention. In the Baldwin case both parties conceded and the entire decision goes upon the theory that the map of definite location gave precision to the right of way. The only question was as to *when* it took effect as to settlers, not *where*.

Moreover, the reasoning in the opinion in that case is entirely consistent with the decision in the Cook case. The land grant in the Baldwin case was of "ten sections in width on each side of said road." The court says (p. 429):

> "The sections could be ascertained only when the route was *definitely fixed*, (not 'when the road was *constructed*'). This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of *ascertaining the most favorable route*." (Not the difficulties experienced in constructing the road).

Again on page 430:

> "If the company could be compelled to purchase its way over any section that might be occupied in advance of its *location* (not 'final *construction*'), very serious obstacles, etc."

Again, on the same page:

> "We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed.'

And what was that construction? Why, that of that which was public land at the date of the grant every alternate section within 40 miles of the line, *as ascertained by the filing*

of the map of definite location, should pass to the company except those to which homestead pre-emption or other claims had then attached. So that, "giving to the words of present grant with respect to the right of way the same construction" would be to hold as the court did that of that which was public lands at the date of the grant, all within 200 feet on each side of the center line, as ascertained *by the filing of the map of definite location*, should pass to the company *without* exception.

The Cook case holds no more and we claim no more in this case.

Not only is the Cook case not in conflict with the Baldwin case but it is in harmony with all the prior decisions of this court, having a bearing upon the questions involved.

As to the effect of proceedings in the general land office, culminating in the issue of the patent to the grantor of defendant in error, the following decisions are pertinent:

> "The question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and pre-emption *depended upon matters disclosed by the record of proceedings in the land department*, namely, that the public surveys had been extended over the land, *and that other lands had been appropriated to the satisfaction of the grant.*"
>
> Quinby v. Conlan, 104 U. S. 420.

> "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the proceedings taken to obtain the title, from

their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law.

* * * * * * * * *

The general doctrine declared may be stated in a different form thus: A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in Minter v. Crommelin, reported in 18th Howard, where it appeared that an act of congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the land department unless specifically directed by the secretary

of the treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the secretary had ordered it to be sold, and the court said:

'The rule being that the patent is evidence that all previous steps have been regularly taken to justify making of the patent, and one of the necessary steps here being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of Bagnell v. Broderick (13 Pet. 436), and is not open to controversy anywhere, and the state court was mistaken in holding otheriwse.'

(Smelting Co. v. Kemp, 104 U. S. 636).

We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, *the acts he has performed to secure the title*, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy

of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It can not be vacated or limited in proceedings where it comes collaterally in question."

Steel v. Smelting Co., 106 U. S. 447.

In Sanford v. Sanford, 139 U. S. 642, the court say:

"In ejectment, the question always is who has the legal title to the demanded premises, not who ought to have it. In such cases the patent of the government, issued upon the direction of the land department, is unassailable."

"Conceding that that construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant, and determining what lands did and what did not pass."

U. S. v. Winona & St. P. R. Co., 165 U. S. 483.

In the case of Western Pacific Railroad Company v. Tevis, 41 Cal. 489, the court say:

"The right of way over the public lands of the United States became perfect upon the filing of the plat of the location of the railroad in the proper land office."

In addition to the case of Barden v. N. P. R. R. Co. (*supra*.) this charter has twice received construction in this court.

In Butts v. N. P. R. R. Co., 119 U. S. 55, the court say:

"The act of congress not only contemplates the filing by the company, in the office of the commissioner of the general land office, of a map showing the definite location of the line of its road * * * but it also contemplates a preliminary designation of the general route of the road, &c."

In St. Paul & P. R. R. Co. v. N. P. R. R. Co., 139 U. S. 1, after speaking of the map *of general* location the opinion proceeds:

> "The company then proceeded with the work of definitely locating the line of the road through that state, and on the 21st of November, 1871, filed in the office of the commissioner of the general land office a map or plat of the line thus definitely fixed, approved by the secretary of the interior. The company subsequently constructed and equipped the road through that state in all respects as a first-class railroad, and has since operated and maintained it. The road was accepted and approved by the president in accordance with the provisions of the fourth section of the act of July 2, 1864.
>
> "There was, therefore, no operative grant until there was an effective release, and, whichever date be taken—whether December 13th or 19th—it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. A map of that location, approved by the secretary of the interior, was filed, as stated above, in the office of the commissioner of the general land office on the 21st of the previous November. No grant, therefore, was in existence of any lands to any other company, which are claimed by the plaintiff in this suit, at the time of the definite location of its route."

The construction which this company itself placed upon the act is apparent not only from the Jackman case (*supra*), but from the case of N. P. R. R. Co. v. Meadows, 46 Fed. R. 254, where the plaintiff in error declared as follows:

> "That the date when said line was definitely fixed and the plat thereof filed was on the 6th day of July, 1882."

There is less room for claiming, as does counsel for plaintiffs in error, that the provisions for filing the map of definite location in the office of the commissioner of the general land office was inserted by congress without intention that it should affect the right of way, because of the fact that congress had long previously adopted that method of fixing rights of way

in acts which *contained no land grants*. On August 4th, 1852, (10 St. L., ch. 80) there was passed "An act to grant the right of way to all rail and plank roads and macadamized turnpikes passing through the public lands belonging to the United States." Section 3 of that act contained the following provision:

> "Provided further, that whenever the location for either of said railroads or plank roads, macadamized turnpikes or sites for depots on the line of such road or roads shall be selected, the proper officers of such road or roads shall transmit to the commissioner of the general land office a correct plat of the survey of said road or roads, together with the surveys of sites for depots, before such selection shall become operative."

In addition to what seems to us the unanswerable logic of the decision of the circuit court of appeals upon that point, we invite the attention of the court to the following pertinent language of the supreme court of Iowa, a state containing probably more miles of land-grant road than any other in the Union, and where the entire situation was clearly understood and declared. In the case of C. R. I. & P. R. Co. v. Grinnell, 51 Iowa, 476 (affirmed in Grinnell v. Railroad Co., 103 U. S. 739), Ch. J. Beck, delivering the opinion of the court, said:

> "When the statute was enacted the railroad had no existence. The object of the grant was to aid in the construction of a road in contemplation, to aid in creating such a railroad. It was well understood by congress that the building of railroads, like all other great enterprises, required forethought and preparation, by the adoption of plans as to the character and extent of the work, and the means for accomplishing it. Indeed, the act itself exhibits such forethought and preparation in designating the termini of the road, and in making the grant in order to provide means for the accomplishment of the enterprise. It was, therefore, well understood by congress that before the railroad would or could be constructed, a route must be surveyed and adopted. It

could not have been expected that so great a work would be prosecuted without fixed plans and designs as to the course and line of the road. Congress well knew that the line of the railroad would be surveyed and adopted by the state, or by the persons natural or artificial that should undertake to construct it. The survey of the route and the location of the line of the railroad, is a part of the work of construction. These are the beginning of the work, it is true, but are, nevertheless, a part of the work and a very important part. They demand great skill and wisdom, and very considerable outlay of money; of necessity, they are, as we have said, the first work to be done; when done, the route or line of the road is fixed—definitely fixed. The railroad has then assumed a form and an existence as an embryo, it is true, but, nevertheless, an existence of the character that is at the beginning of all things which do not spring up complete by the magic of a word or a single act. The line surveyed and adopted is just as definitely fixed, as permanently located, as it is after the road is built. In either case it may be changed by the exercise of the will of those having control of the road. In the exercise of that will the line of the road, when the survey is adopted, may be changed before the work is commenced; so it may be changed at any time afterward, even when the road is fully completed and in operation. The effect of a change in one case, is not different from a change in the other. In neither case would the fact of the change lead to the conclusion that the railroad had not been definitely located by the survey first adopted. It is true that it may not be said to be permanently located, for nothing that depends upon the changeable will of man is permanent. The plaintiff's railroad, today, cannot be said to be permanently, unchangeably located, except as to the points fixed by the statutes under which it received the grant of lands. If the interest of trade requires changes at particular points they may be made. The line of the road, today, however, is definitely fixed—unmistakably located; but no more definitely fixed than when the survey was first made and adopted."

We beg to suggest that even a strict construction of the

charter gave to the plaintiff in error the amplest opportunity to exercise its election after it had been fully informed as to the most feasible route in every particular, and to so designate its line of definite location as to best accomplish its purposes, and even after this was done a grant of 400 feet in width, nearly *forty* times the usual width of road bed, was ample for ordinary variations and the right of eminent domain was intended to apply to other cases.

Referring now to the cases cited by counsel for plaintiff in error, which have not already been discussed, we assert that none of them contains anything opposed to our position.

In the case of C. P. R. R. Co. v. Dyer, 1 Sawyer 643, the only question before the court and the only question decided was that acquisitions of the land over which the right of way was granted, made subsequent to the passage of the act, are subject to the exercise of the right; and that the *reservations* and *exceptions* found in the preceding section apply only to the grants of land therein mentioned, and not to the grant of the right of way; and that the map of *general route* does not affect the grant of the right of way.

The case of M. K. & T. Ry. Co. v. K. P. R. Co., 97 U. S. 491, embraced in the citation upon page 12 of counsel's brief, was not a right-of-way case. Moreover, the act there construed (12 St. L. 489 and known as the Union Pacific act) was radically different in respect of the matters here in controversy from the Northern Pacific act. Where, in the former, in section 3, the provision as to pre-emption and homestead exemptions out of lands granted reads, "may not have attached at the

time the line of said road is definitely fixed," the latter reads, "at the time the line of said road is definitely fixed *and a plat thereof filed in the office of the commissioner of the general land office.*" Besides, in the Union Pacific act, section 9 contained the following provision which affected the lands in question in that case:

> "The route in Kansas west of the meridian of Fort Riley to the aforesaid point on the 100th meridian of longitude, *to be subject to the approval of the president of the United States and to be determined by him on the actual survey.*"

When congress came to pass the Northern Pacific act it evidently occurred to them that it would be much more appropriate to provide for the selection of the line of definite location by the company, and the filing of a map of definite location in the office of the commissioner of the general land office, and they so provided.

We submit that this case supports, rather than opposes, our contention.

In the case of Leavenworth, etc., R. R. Co. v. U. S. 92 U. S. 733, which also was not a right-of-way case, and which company had by act of congress, (17 St. L. 5), "for the purpose of improving its route and accommodating the country," been authorized to "relocate any portion of its road south of the town of Thayer within the limits of its grant," the question was whether a recital in the act authorizing the relocation, to the effect that certain lands were within the limits of its grant, had the effect of extending the limits of such grant, and it was held that it did not. The case was cited by the court in the Baldwin case merely as holding that such grants are *in praesenti.*

Hamilton v. Spokane & P. Ry. Co., 2 Ida. 898, holds only that the grant of the right of way operated upon school sections reserved from prior pre-emption claim. There was no question of the location of the right of way, or abandonment, and the court says:

> "In the case at bar the grant took effect from the date of the approval of the plat, which was July 11, 1889."

In the case of Union Pacific Ry. Co. v. Douglas Co., 31 Fed. R. 540, the only question was whether the Union Pacific grant of right of way was operative upon sections 16 and 36, the sections granted for school purposes to the state of Nebraska; and the court held that it was ~~not~~, saying:

> "No provision is made for condemning the right of way over school sections, nor is it easily to be perceived how, under the statute then in force, proceedings could be had for such condemnation."

There was no question of location of the right-of-way involved.

The case of Bybee v. Oregon & C. Ry. Co., 26 Fed. R. 586, cited by counsel, has heretofore been cited by us as an authority to the contrary. In that case the court expressly held that the grant of the right of way was absolute, "to take effect on the definite location of the line of the road, from the passage of the act."

The case of Doran v. C. P. R. Co., 24 Cal. 246, does not affect the question of when the right of way attaches, but holds that the grant extends to and covers all public lands whether mineral or not. Moreover it is an authority in support of our proposition, hereinafter stated, upon the question of *res judicata*.

The case of Washington & I. R. Co. v. Couer d'Alene Ry. &

N. Co., 160 U. S. 77, cited by plaintiff in error, differed from the case at bar in the following particulars:

In the first place, the right of way in question in that action was claimed under the provisions of the act of March 3rd, 1875, "An act granting to railroads the right of way through the public lands of the United States." *There is no reference in the act to either a map of definite location or the filing thereof in the office of the land commissioner of the general land office for any purpose whatever.* The words "definite location" and "definitely located" are not found in the act. Section 4 thereof is as follows:

> "That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the *register of the land office for the district where such land is located, a profile of its road,* and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office; and *thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.*

The word "profile," while not aptly chosen, was evidently used to convey the idea that there should be delineated upon the plats required by law to be kept in the local land offices, an outline of the route of the railroads constructed under that act *sufficiently definite only to enable the local land officers to ascertain through what particular quarter sections or other subdivisions the proposed route was to run,* so that patents of such lands might issue "subject to such right of way," without attempting to exactly define the same. It no more resembles in its character or purpose the "map of definite location" which, under the Northern Pacific act, was

to be filed in the general land office, than the silhouette of our forefathers resembles the finished photograph of the present day. Moreover, in that case, it appears by the sixth finding of fact, "that at all the times above mentioned, the lands in controversy, and all other lands along the line of said railroad of the defendant, *were unsurveyed public lands of the United States*," It further appeared that the land in question was occupied by the railroad, side-tracks and depot of the defendant, and that neither the plaintiff nor any person for it ever made or did any act upon the premises or took any possession thereof. Consequently, the court well held that "Regarding this question as one entirely between the Couer d'Alene Railway and Navigation Company and the United States, it should be observed that the act of congress under which both parties claim the land in question, by its fourth section, provides that *in case of unsurveyed lands of the United States, as these were, the plat need not be filed until twelve months after the survey thereof*," and "that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened," and that "if the United States could not and do not complain there is no foundation for the plaintiff company to do so."

In *this case* the United States has acted by the issue of its patent.

The case of N. P. R. R. Co. v. Colburn, 164 U. S. 383, is cited upon page 17 of counsel's brief to the effect that "it is now settled that mere occupation without the filing of any claim in the land office does not attach any private rights to the land as against the United States." The decision merely held "that no *pre-emption* or *homestead* claim attaches to a grant until an entry in the local land office." But, as we have seen,

under sec. 2387 R. S., settlement upon land afterwar.'s entered as a townsite, gives rights which relate back to the date of the settlement.

FORMER ADJUDICATION.

We have seen that the Dakota Code, § 298 (*ante*, p. 8) required the judgment to *specify clearly* the relief granted.

As we have already stated, the *judgment* in the prior action was "that the plaintiff have judgment herein on the demurrer as frivolous, and that plaintiff recover *possession of the real estate* described as follows * * *; and also six cents damages for the withholding *possession* thereof." There was certainly no *express* adjudication of anything except right of possession. As we shall attempt to show, under an unbroken line of decisions of the supreme court of California, from which state the Code of Dakota was copied *verbatim*, rendered before such adoption, this judgment could have been rendered upon proof of any facts showing right of possession as against the defendant at the commencement of the action. Therefore the judgment established that right and nothing more. But, while insisting upon that proposition, which we claim the authorities hereinafter cited support, we will for convenience consider in the same connection, the effect of that judgment upon the theory that resort is to be had to the complaint. It was there alleged: 1. That plaintiff was a corporation created by the Act of Congress of July 2, 1864. 2. That defendants Brown and Wringose were and had been for three years last copartners. 3. "That in May, 1873, plaintiff became *seized* in fee for the use and purpose of a right of way to the following described real estate, viz., that certain tract of land 200 feet in width and 300 feet in length, lying between

Third and Fourth streets and north and along the railroad track in the city of Bismarck." 4. "That Browning & Wringrose, one of the defendants above named, on or about the 1st day of October, 1874, *wrongfully and unlawfully went into possession* of that part of said tract of land described as follows * * * 5. That on or about the 1st day of November, 1876, the said Browning & Wringrose rented said premises to P. R. Smith, who is now in the possession thereof. 6. That defendant *wrongfully and unlawfully* withholds the possession thereof from plaintiff. The prayer is for "judgment for the possession of said premises and for $500 damages, the plaintiff's damages by withholding of the same."

Where is the allegation that the United States in May, 1873, or at any other time, granted the premises to the plaintiff for a right of way or for any other purpose? There were at least two other ways in which plaintiff could have become "seized in fee for the use and purpose of a right of way," whatever that means. 1. As the land had been surveyed in 1872, (Trans., p. 16) it could have been conveyed to plaintiff, or 2. It could have acquired it under Sec. 7 of its charter, as it afterwards did the Jackman land in the adjoining section (See N. P. R. R. Co. v. Jackman, *supra*). In the next place, as we shall try to show, all of that complaint after the *first* allegation was immaterial and not well pleaded (and nothing of that character is admitted by a demurrer) except that plaintiff in May, 1873, became seized of the premises, that defendants wrongfully and unlawfully entered and wrongfully and unlawfully withheld possession. Those allegations, we submit, would have supported the judgment and it establishes no others, even *inferentially*. How, or for what purpose, plaintiff became seized was immaterial. The question was, *was it seized?*" And this "*seizin*," under the law of Dakota, as it then existed, was "*possession*,"

and nothing else, as we think the authorities establish. Plaintiff did not ask, nor did the judgment purport to grant any relief except "*possession.*"

The demurrer in the former action did not admit the recitals of the complaint.

> "The averments of the bill as to the purport and meaning of the provisions of the indenture, the object of their insertion in the instrument, and the obligations they imposed upon the corporation and the trustees, and the *rights they conferred upon the plaintiff* when his contract was approved, are not admitted by the demurrer. These are matters of legal inference, conclusions of law upon the construction of the indenture, and are open to contention, a copy of the instrument itself being annexed to the bill, and therefore, before the court for inspection. A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated."
>
> Dillon v. Barnard, 21 Wall. 430.

The allegation in the complaint in the former action that plaintiff became "seized" of the premises, was equivalent to an allegation of actual possession.

> "As a general proposition, by the law in this country, the making, delivering and recording of a deed of land passes the seizin thereof without any formal entry being necessary. This is generally by force of the statutes of the several states; in some, such a deed being in terms declared to be equivalent to livery of seizin, *and in others dispensing with any further act to pass a full and complete title.*"
>
> 1 Wash. R. Prop.* 38.

The latter is now the case in Dakota, but the act was not passed until 1877, while this seizin is alleged to have occurred in May, 1873.

Bouvier defines seizin as "possession with an intent on the part of him who holds it to claim a freehold estate." To the same effect is 1 Wash. R. Prop. 35.

> "Seizin, as now understood, is either *in fact* or *in law*. To constitute a seizin in fact, there must be an actual possession of the land. Seizin in fact necessarily implies possession, there being 'no legal difference between the words seizin and possession,' if the possession be with an intent on the part of him who holds it to claim a freehold interest. Seizin in law occurs where an ancestor or devisor dies leaving his lands vacant, the heir in the one case and the devisee in the other are deemed, by the law, to have a seizin which may at any time be converted into a seizin in fact."
>
> See also 3 Id., pp. 485, 487 and 493.

> "*Seizin*. A possession of real property founded on title. Enjoyment *or occupancy*, assumed in virtue of a right."
>
> Abbott's Law Dict.

> "*Seizin*. Possession, with intent on the part of him who holds it to claim a free hold interest."
>
> Black's Law Dict.

> "*Seizin*. The possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. *Ordinarily*, a possession *in fact* by one having or claiming a freehold interest."
>
> Anderson's Law Dict.

This was practically held in Massachusetts as early as the case of Marston v. Hobbs, 2 Mass. 437, affirmed in Bigelow v. Paige, 2 Mass. 455; Bearce v. Jackson, 4 Mass. 408, Slater v. Rawson, 6 Met. 444, and Raymond v. Raymond, 10 Cush. 134,—where the court say:

> "These covenants do not express or imply a warranty

> of any absolute title; they relate to the *actual* seizin of the grantor and that he has such *possession* of the premises as that he may execute a deed thereof. This covenant of a right to convey is synonymous with the covenant of seizin. The actual seizin of the grantor will support both of these covenants, irrespective of his having a good indefeasible title."
>
> "A seizin once had is presumed to continue."
>
> 3 Wash. R. Prop. * p. 493.

But, whether the allegation is to be treated as alleging merely possession or not, *proof of plaintiff's prior possession and defendant's trespass would have supported the judgment*, under the Code of Dakota, § 581 (*ante*, p. 8) and particularly under the authoritative decisions of California, there having been none in Dakota, and this proposition is also supported by decisions of this and other courts.

The code of Dakota was copied *verbatim* from that of California. Referring to the California code this court said:

> "The ruling was in conformity with the settled law of the state. Under the allegation of seizin in the complaint, it was sufficient, as determined by repeated adjudications of the Supreme Court of the state, for the plaintiff to establish any interest in the premises which gave him a right of possession. The action of ejectment determines no rights but those of present possession."
>
> Hardy v. Johnson, 1 Wall. 371.
>
> "Possession is always *prima facie* evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. The allegation that the plaintiff was in possession at the time of the ouster complained of, is a sufficient allegation of title to make the declaration good."
>
> Hutchinson v. Perley, 4 Cal. 33.
>
> Hicks et al. v. Davis et al., 4 Cal. 67; same point.

"Where the plaintiff in ejectment pleads a fee simple title, he is not compelled to prove the same, but can rely upon prior possession. The defendant, when a mere naked trespasser, cannot introduce evidence to show that the title is in a third party, or that the fee of the land in question is in the government of the United States."

Winans v. Christy, 4 Cal. 70.

"Possession of real estate is *prima facie* evidence of title, and sufficient to maintain ejectment."

Plume v. Seward, 4 Cal. 94.

McMinn v. Mayes, 4 Cal. 209.

"We have often held that possession is evidence of title, but it is equally true that possession gives a right of action against a mere trespasser, even where the title may be shown to exist in another."

Bequette v. Caulfield, 4 Cal. 278.

"Possession is evidence of title, and the party in possession is therefore deemed in law to be the owner, as against all others not having a superior title."

Bird v. Lisbros, 9 Cal. 1.

"It is the settled doctrine of the law, repeatedly affirmed by this court, that prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action."

Nagle v. Macy, 9 Cal. 426; citing the foregoing cases.

In Coryell v. Cain, 16 Cal. 567, Mr. Chief Justice Field, delivering the opinion of the court, said:

"It is undoubtedly true as a general rule that the claimant in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's; and that it is a sufficient answer to his action to show title out of him and in a third party. But this rule has in this state, from the anomalous condition of things, arising from the peculiar character of

the mining and landed interests of the country, been to a certain extent qualified and limited. The larger portion of the mining lands within the state belong to the United States, and yet that fact has never been considered as a sufficient answer to the prosecution of actions for the recovery of portions of such lands.

"Actions for the possession of mining claims, water privileges, and the like, situated upon the public lands, are matters of daily occurrence, and if proof of the paramount title of the government would operate to defeat them, confusion and ruin would be the result. In determining controversies between parties thus situated, the court proceeds upon the presumption of a grant from the government to the first appropriator; *and with the public lands which are not mineral lands*, the title, as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor and to proceed from him."

In Hubbard v. Barry, 21 Cal. 221, Mr. Chief Justice Field, delivering the opinion of the court, quotes the last above case, and adds:

"A similar rule is followed by us, though not founded upon a like presumption, in controversies for the possession of lands, where the real title is not in the government but is in an individual with whom, or in a corporation with which, neither of the parties connects himself. The owner of the true title not objecting or consenting to the possession of either of the parties, the court regards the better title, as between the parties, to be vested in the first possessor and grantees claiming through him. The rule rests upon its necessity for the preservation of peace and quiet in a country where titles to tracts of land, measured by leagues, are under consideration by the tribunals of the United States, and there is an indisposition in numerous instances on the part of claimants to assert their legal rights against the occupants until the final action of those tribunals."

In Southern Pacific R. R. Co. v. Orton, 6 Sawyer 157, the court held that *the line designated by a plat filed in the office*

of the commissioner of the general land office was the one contemplated by the act of congress; and that as it was competent for the corporation to take and hold land for some purposes, the settled rule in cases like that was that strangers could not litigate the question,—that it was a matter between the state and the corporation. Citing Matomah Co. v. Clarkin, 14 Ill. 542.

Mr. Justice Field, speaking for the court, said:

> "Whether or not the premises in controversy are necessary for the purposes of the corporation, is a matter between the government and the corporation, and is no concern of the defendants."
>
> "According to the settled principles of the common law, this is not a defence to the action. The plaintiff says he was seized in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title, it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder can not enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is till practiced, * * * or by an ejectment, * * * or he may maintain trespass. * * *
>
> Christy v. Scott, 14 How. 282," (quoted and approved in Sabariego v. Maverick, 124 U. S. 261).

In Hussey v. Smith, 99 U. S. 22, Mr. Justice Swayne, delivering the opinion of the court, said:

> "There can be no question that under the act of congress of March 2, 1867, (14 Stat. 541) Smith had an equit-

able interest in the premises in controversy which he could sell and convey."

(If he could convey he could recover for an invasion of it.)

"This principle is so well settled in the law of ejectment and trespass *quare clausum fregit*, as to need no citation of authority. It will be found laid down by Mr. Greenleaf in 2 Greenl. Evid., sect. 311, that either actual possession of the premises or receipt of rent is *prima facie* evidence of title in fee; also sect. 618, 618a. See also Hutchinson v. Perley, 4 Cal. 33; Nagle v. Macy, 9 Id. 426."

Burt v. Panjaud, 99 U. S. 180.

In Stringfellow v. Cain, 99 U. S. 615, the court say:

"In Hussey v. Smith (*supra*) we held that a non-resident might, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust. The power of an occupant to sell and convey his *possessory rights* is clearly recognized by the territorial statute."

"In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and, as against a mere trespasser it is sufficient. 2 Greenl. Evid. sect. 311."

Campbell v. Rankin, 99 U. S. 261.

"The plaintiffs and their predecessors in interest had made valuable improvements upon the lots, to which they *held a possessory right* at the time of the entry of the town-site."

Ashby v. Hall, 119 U. S. 527.

In Haws v. Victoria Copper Mining Co., 160 U. S. 303, the court say:

"The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary, but this principle is subject to the qualification that *possession alone is adequate as*

against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious, conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser can not make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed."

(Here the court gave the foregoing quotations from Christy v. Scott, 14 How. 282, 292, and Burt v. Panjaud, 99 U. S. 180:)

"As against a naked trespasser having neither claim nor color of title, proof of prior undisturbed possession is sufficient. Nor can a trespasser show an outstanding title in a third person. The principles of the action remain essentially unchanged; in fact, it is still one to recover the possession of land, in which the plaintiff must show a present legal right of possession, though in fact it is an action for determination of title. As the action retains many of its ancient characteristics it is important to remember that in its early form the question of title to land came before the court incidentally and collaterally, the trespass and ouster being the main issue.

Sedgwick and Wait Tr. Tit. to Land, sec. 58.

"But, although the general rule in actions of ejectment is, that the claimant must recover upon the strength of his own title, as above stated, this general principle has been so far modified, that, when the owner of the true title neither objects or consents to the possession of either party, the court regards the better right, as between the parties, to be vested in the first possessor, and grantees claiming through him. And when no legal title is shown, the party showing the prior possession will be held to have the better right. A *prior possession* is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrong doer, or a person subsequently entering with-

out lawful right, if the action to regain the prior possession be brought within a reasonable time."

Tyler on Ejectment, p. 72.

"*Issues concluded by judgment in ejectment.* Under the code a judgment in ejectment in conclusive of but two points,—the right of possession in plaintiff at the commencement of the suit, and the occupation of the premises by the defendant at the same date. At common law the judgment was, in an action for mesne profits, conclusive of the title at the time of the alleged demise. Under our practice the rule is different, because the plaintiff is entitled to recover upon proof of right to the possession at the commencement of his suit; and an allegation, on his part, in relation to the date of the acquisition of his title is immaterial."

Freeman on Judgments, Sec. 301.

"As against a mere trespasser, a bare peaceable possession by an actual occupant under claim of ownership, is ordinarily sufficient to authorize recovery; and such trespasser can not defend successfully by showing an outstanding title with which he in no way connects himself."

Wilson v. Glenn, 68 Ala. 383.

"A person who has lawful possession of lands may maintain an action for trespass committed upon them, and in his declaration need not set out more than his possessory title; *but if it goes further and alleges that he was well seized and possessed of those lands, and has a good, indefeasible estate in fee simple, and on the trial fails to establish such title, still he may recover upon proof of a lawful possession* during the period in which the injury complained of was committed; and if the case were tried upon the general issue, the record of it in a subsequent case between the same parties would prove nothing more than the plaintiff was bound to prove to entitle him to the verdict which he obtained."

Barker v. Hotchkiss, 25 Conn. 320.

"Such a judgment is *res judicata* as between the parties, that plaintiff's possession before the trespass in

that suit complained of, was peaceable and prior to defendant's, and of such a character to entitle the plaintiff to retake it if it could be done peaceably."

Ill. & St. Louis R. R. & Coal Co. v. Cobb, 82 Ill. 183.

"One who is in peaceable possession of land may rely upon such possession in an action against a trespasser."

Bertram v. Cook, 44 Mich. 396.

"A judgment in such an action is not conclusive upon the title, because the right of possession only, and not the title, is involved in an action of trespass. It is not conclusive upon the right of possession even at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or right which the defendant had at the time of the former trial. Such intervening events affecting the issue may be shown to prevent a former judgment from being conclusive, even where the *title* has been tried in a writ of entry."

Morse v. Marshall, 97 Mass. 519.

"There may be a possessory title, the holder of which may be treated by the true owner as a tort feasor, but which will avail such holder in maintaining an action of trespass or a writ of entry against a stranger for a disturbance of his possession. Nor in such an action could the defendant be permitted to show that the plaintiff's or defendant's possession was not that of the true owner, as there may be a possession perfectly legal and valid against one and yet wholly insufficient as against another."

Perry v. Weeks, 137 Mass. 584.

"A prior possession is sufficient to entitle the plaintiff in ejectment to recover against a mere intruder. We do not see why an outstanding title in the commonwealth furnishes a tenant a right to deny his landlord's right of possession, or *justifies an intruder in entering upon the peaceable possession of another.*"

Kline v. Johnston, 24 Pa. St. 72.

"The first count in the declaration states that the plaintiff was *seized and possessed* of a certain piece of land, with the appurtenances and easements thereunto belonging," etc., "and, by reason thereof, was entitled to the way. Now, the plaintiff was not seized in the strict land sense of that word; he had only a *possession* in right of his wife. According to the authorities it was not necessary for the plaintiff to have alleged a seizin in the land—possession alone, if rightful, was sufficient to maintain the action. The objection is, that, having so stated his title, he was bound to prove it. This, in general, is true, but in actions for torts the same strict rule of proof is not required as on contracts. This mode of stating the plaintiff's title is usual in actions of trespass; and I have never known the objection to prevail, that he did not prove *both* seizin and possession."

Pearce v. McClenaghan, 5 Rich. (S. C.) 178.

But even if title were in issue and determined in the former action, it was not the title here in question. To be effectual as a bar the *precise* question *must* have been adjudicated.

"It is not true that a court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the *same questions exactly*.'

Buck v. Colbath, 3 Wall. 334.

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necesarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been ren-

dered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, *even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.*"

Packet Co. v. Sickles, 5 Wall. 580.

Now, what was *necessarily tried and determined* in that former judgment? Certainly no more than that the plaintiff was at the time of the comencement of the action entitled to the possession of the property described therein as against the defendant Smith, a trespasser. According to the above decision, even if the attempted allegation of a right of way in the plaintiff was properly within the issue controverted therein, how can it be "shown that the judgment necessarily involved its consideration and determination"?

"But, when the pendency of such suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. *This relief must be founded on the same facts*, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties. In the case of Barrows v. Kindred, which was an action of ejectment, the plaintiff showed a good title to the land, and the defendant relied on a former judgment in his favor, between the same parties for the same land; the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this court held that as in the second suit the plain-

tiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit."

Watson v. Jones, 13 Wall. 679.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually* litigated and determined in the original action, not what *might have been* thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Cromwell v. County of Sac, 94 U. S. 351.

(In this opinion the cases of Outram v. Morewood, Gardner v. Bugbee, and Packet Co. v. Sickles, cited by counsel for plaintiff in error, were fully discussed.) The opinion proceeds:

"The case of Howlett v. Tarte, 10 C. B. n. s. 813, supports this view. That was an action for rent, under a building agreement. The defendant pleaded a subsequent agreement, changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer, the replication, after full argument, was held bad. In deciding the case, Mr. Justice Willes said: 'It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up

a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. * * * I think we should do wrong to favor the introduction of this new device into the law.' Mr. Justice Byles said: 'It is plain that there is no authority for saying that the defendant is precluded from setting up this defence.' Mr. Justice Keating said: 'This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant.'"

Id. p. 357.

In Britton v. Thornton, 112 U. S. 526, which came from Pennsylvania, the court say:

"But, in Mercer v. Watson, the court, after full consideration of the terms of the statute and of the reasons for its passage, concluded that "the legislature did not intend to bar the party from bringing a new action of ejectment for the same land, upon the same title, *until after two decisions should be had against him upon a full view and consideration of the whole of his case, and all the circumstances connected with it which he might think material.* In Treaster v. Fleischer, 7 W. & S. 137, it was adjudged that, although the statute did not expressly say so, the former verdicts and judgments must have been on the same title; because, in the words of Chief Justice Gibson, *'it certainly could not have been intended that a title should be barred by adjudication without having been adjudicated.'*

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, *either* upon the face of the record or be shown by extrinsic evidence, that the *precise question* was raised and determined in the former suit. If there be any uncertainty on this head in the record * * * the whole subject matter of the action will be at large, and open to a new contention, un-

less this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.

* * * * * * * * *

"According to Coke, an estoppel must 'be certain to every intent;' and if upon the face of a record anything is left to conjecture as to what was *necessarily involved and decided*, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. See Aiken v. Peck, 22 Vt. 260, and Hooker v. Hubbard, 102 Mass. 245."

Russell v. Place, 94 U. S. 606. (Reaffirmed in De Sollar v. Hanscome, 158 U. S. 216).

"This suit was brought upon a different cause of action from that upon which the former suit was brought. Whether the same issues were raised and *passed upon* in that suit which are raised in this, the stipulation does not inform us. The question is too general in its terms to admit of a *precise answer*. If the defendant sought to set up in this suit some *new defence, which was not made in the former one, and not necessarily decided therein*, it should have been allowed to do so, under the ruling of this court in Cromwell v. Sac County, 94 U. S. 351, 354."

Enfield v. Jordan, 119 U. S. 680.

"The recitals cut off the defense pleaded of original invalidity.. In this action notice is proved, and *an additional fact is put into the case, which makes a new question.* The effect of recital is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. *Surely an adjudication as to the effect of one fact alone does not preclude in the second suit, an inquiry and determination as to the effect of that fact in conjunction with others.* Infancy is pleaded in an action on a contract, and an adjudication is made establishing it as a defense. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove ratification after majority? Many reasons may induce or prevent the in-

troduction into the first case of all the facts. It was well said in Cromwell v. County of Sac, page 356, that:

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, *other demands arising out of the same transaction.*"

"This case may be looked at in another light. The defense pleaded in the Des Moines suit was that at the time of the issue of the two bonds then disclosed, there was a prior indebtedness of the district exceeding the constitutional limitation, and that defense was the one adjudged to be precluded by the recitals. Here an additional defense is that the five bonds in suit themselves created an over issue. *That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case.* It is of itself a valid defense, irrespective of prior indebtedness. So we have in this case a new question not presented in the Des Moines suit; the existence of facts never called to the attention of the court in that case, which of themselves create a perfect defense."

Nesbitt v. Independent Dist. of Riverside, 144 U. S. 610.

"As we have seen, the state supreme court did not seem to have before it the question *whether the transaction was not really a sale, and not a donation.* * * * Nor, as we have further seen, do the character and functions of the Northern Pacific Railroad Company as a *national highway and instrument of interstate commerce* appear to have been considered."

Roberts v. Northern Pac. R. R. Co., 158 U. S. 1.

"But in a subsequent action involving a different sub-

ject-matter, the former adjudication can not be relied upon, unless it appears not only that the issue now presented was presented, and ought to have been litigated in the prior action; but, further, that it was litigated and decided, as well as involved."

Freeman on Judgments, Sec. 253.

"No record is conclusive as to the truth of any imaterial allegations contained in the pleadings."

"And this rule will hold good in relation to all facts stated in the pleadings of either party, whether denied or admitted by his adversary, if the existence or nonexistence of those facts could have no effect upon the final determination of the rights of the parties."

Id. Sec. 271.

"A former judgment or decree between the same parties is conclusive evidence only of the facts which were in issue and decided, and not of facts which were assumed or admitted for the purposes of the former suit."

Black on Judgments, Sec. 622.

"A verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered."

Herman on Estoppel and Res Judicata, Sec. 254.

In Laird v. City of De Soto, 32 Fed. R. 652, which was an action upon municipal bonds, some of the same series of which had previously been the subject of litigation, Mr. Justice Brewer, then upon the circuit, said:

"This suit is not upon the same causes of action as the prior suits, and the rule of estoppel in respect thereto has been finally and definitely settled by the supreme court in at least three cases. Cromwell v. Sac County; Russell v. Place; Enfield v. Jordon. That rule is this: that where the second suit is not upon the same

causes of action, though between the same parties, the former judgment is conclusive as to matters *which were in fact and necessarily decided*, and is not conclusive as to matters which might have been, but which were not, presented and decided. It is further held that we must look to the record of the former cause to see if that shows what was certainly decided."

"It need hardly be remarked that the effect of verdicts, whether upon parties or privies, altogether depends on the question whether the same point was in issue. A verdict between two parties upon one question can, of course, have no binding effect in an issue joined between them on another. Nor will the verdict be admissible, unless it appears clear that the same point actually was in issue. It is not sufficient that it might have been so. See the expressions of Lord Ellenborough in Outram v. Morewood, *ubi supra*, where, speaking of the verdict in Evelyn v. Harries, his lordship says that 'it could not have been pleaded by way of estoppel, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel in the second action."

Duchess of Kingston's Case; 3 Smith's L. C., 9th Am. Ed. p. 2020.

Whaley v. Stevens, 24 S. C. 479, was a case where the former action was brought for obstruction of a right of way in gross. The second action was brought for the obstruction of the same right of way, but as appendant or appurtenant to a certain plantation. The court held that the causes of action were different, and that the former judgment could not be used in bar in the second action.

"The rule is well settled that nothing can be pleaded by way of estoppel, or relied on as conclusive evidence against a party, except it was directly in issue and found by the former verdict."

Gilbert v. Thompson, 9 Cush. 348.

"A judgment is conclusive by way of estoppel only as to facts, without the existence and proof or admission of which it *could not have been rendered.*"

Leonard v. Whitney, 109 Mass. 265.

"To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. *It must also appear to have been precisely determined.*"

Foster v. Busteed, 100 Mass. 409.

"A former adjudication of the right of action, where the court had jurisdiction of the subject matter and of the parties, is unquestionably a bar to an action for the same debt or claim, and is conclusive where the same subject matter is sought to be again litigated, no matter how, between the parties. In such case it is no answer to say, 'There were questions which were not raised or litigated.' It is enough if they might have been raised and litigated. But it is a different matter when an action is sought to be maintained or defeated *by showing a former adjudication of questions upon which it depends. In such case it must appear that such questions were litigated as a matter of fact;* that they were *submitted to and decided* by the jury or court; and that they were not collateral inquiries, but were crucial questions in the other controversy. The question becomes one of law if the record contains the conclusive evidence of it."

Bond v. Markstrum, 102 Mich. 11.

"The conclusive character of a judgment extends only to identical issues, and they must be such, not merely in name but in fact and substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not, if it is intrinsically and substantially an entirely different issue, *even though capable of being described in similar language, or by a com-*

mon form of expression, then the truth is not excluded, and the judgment is no answer to the different issue."

Palmer v. Hussey, 87 N. Y. 303.

"*Facts in controversy* on the trial of an issue but *not necessarily involved in issue*, though ever so important to its determination, are not settled by a judgment on the issue; but are open to controversy in any other suit between the same parties and their privies."

Doonan v. Glynn, 28 W. Va. 715.

The recent case of Richaud v. Tysen, 78 Fed. R. 561, is instructive. There it appears that in a former action in North Carolina the predecessor of the plaintiffs, as receiver of a national bank, had sued the same defendant and others, as heirs of one James Dawson, for liability upon stock; and the report of the former case in 70 Fed. R. 424 shows that it appeared from the evidence that one Field, as executor of Dawson's wife, was the owner of the stock; and thereupon the court dismissed the action. But the court, Shipman, C. J., says:

"The decree in the North Carolina case does not show that the court *necessarily and directly* found that at the date of the failure of the bank Field owned the stock."

and notwithstanding the recitals of evidence in the statement of the case, in the former action, and in the opinions both of the circuit court of appeals to that effect, refused to treat the former judgment as a bar.

In the 8th circuit Mr. Justice Miller, in the case of Keator v. St. John, 42 Fed R. 585, discussed this question. That was an action brought to charge the defendant for $18,000 money fraudulently received by him from a purchaser while he was acting as agent of the vendor. The defendant pleaded in bar a former judgment rendered in an action brought for the same purpose. Mr. Justice Miller said:

"It is very true there is a liberal statement in the first action against Mr. St. John, about his committing fraud on the plaintiff, and about the fraud concerning the purchase of this same land; and it is barely possible that under the first declaration the present fraud of the defendant having received $18,000 from the other side while acting as the agent of the plaintiff, might have been presented and considered. But it does not appear that it was proved. * * * The doctrine on that subject has undergone some modification, and has always been liable to some divergence of opinion in different courts at different times. Perhaps the doctrine as now established and as now acted upon by the supreme court of the United States is best stated in the case of Cromwell v. Sac Co., 94 U. S. 351, which was cited here the other day. It had been held in the case of Aurora v. West, 7 Wall. 82, that not only would what was actually decided in the first suit be a bar to a second suit for the same cause of action, but that whatever might have been decided under that issue was a bar to any further prosecution for the same cause of action. In Cromwell v. Sac. Co., it was held that the rule in Aurora v. West was a dictum not necessary to the case; that to be a bar to a subsequent suit the matter must either have been actually tried and decided, or it must have been inferentially decided; that is, it must be proven as an actual fact that it was submitted to the first court or jury, or it must be an inference from the state of the pleadings that the judgment rendered must have been considered in the trial court. I think that is the solid foundation on which the doctrine of *res judicata* rests."

Counsel for plaintiff in error says, upon page 20 of his brief, —"The estoppel of a judgment, while not extending to points not in issue, does cover every point which is in issue." This is hardly supported by the foregoing authorities and seems to be in conflict with the language of this court in Cromwell v. Sac. Co., as follows (94 U. S., p. 356):

"A judgment by default admits, for the purposes of

the action, the legality of the demand or claim in the suit; *it does not make the allegations of the declaration or complaint evidence in an action upon a different claim.*"

AFTER-ACQUIRED TITLE.

The judgment in the former action could not have the effect to bar the after-acquired title of defendant in error.

"But this (former adjudication against him in ejectment) did not deprive Barrows of the right to acquire a new and distinct title; and, having done so, he had the same right to assert it, without prejudice from the former suit, which would have accompanied the title into the hands of a stranger. At the termination of that suit the executors had not passed the title to any one. They did not transfer it for more than a year afterwards. How, then, can it be said to have been involved or in any wise affected by the prior litigation? The plaintiff could no more be barred than any other person who might have subsequently acquired the title."

Barrows v. Kindred, 4 Wall. 399.

As already stated, the Dakota code in force when the former action was prosecuted was copied *verbatim* from that of California. In an action arising under the latter, this court has said:

"In California a judgment in ejectment has the same conclusiveness as a judgment in any common law action, and in determining its effect the same principles are applied which control the result of the like inquiry in other cases. A defeated plaintiff may bring a new action upon an after-acquired title with the same effect as a stranger in whom such title might have been vested, and the former judgment will no more bar one than the other."

Merryman v. Bourne, 9 Wall. 592.

"In regard to the effect of a judgment in ejectment, it

may be remembered that it is not a bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as they were in the first suit. There is no evidence here that the same titles and defenses were set up in the former suit as were relied on in this."

Foster v. Evans, 51 Missouri 39.

If the Dakota action could be construed as having the effect claimed for it by counsel for plaintiff in error, it would contravene the organic act and the policy which this court has ever sustained.

"With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall also not interfere 'with any regulation that congress may find necessary for securing the title in such soil to the bona fide purchasers.'

"The same principle which forbids any state legislation interfering with the power of congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when

transferred, goes the right to possess and enjoy the land, and it *would amount to a denial of the power of disposal in congress if these benefits, which should follow upon the acquisition of the title, could be forfeited because they were not asserted before that title was issued.*

"But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted."

Gibson v. Choteau, 13 Wall. 92.

"A party may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first."

Vance v. Olinger, 27 Cal. 358.

The earliest case in California is that of Yount v. Howell, 14 Cal. 465, decided in 1859. The opinion, which was delivered by Chief Justice Field, discusses the subject as follows:

"The rule of the common law in relation to the proof of a legal estate and the right of entry at the date of the demise laid in the declaration, has no application under our system. The action of ejectment, at common law, proceeded upon a fictitious demise; and hence it became necessary to show title in the lessor of the plaintiff at the date of the alleged demise. In our system the fiction has no existence. In our practice it is sufficient if it appear that the plaintiff was entitled to the possession of the premises at the commencement of the action, and the date of the alleged sezin or possession and ouster become material only when the question of mesne profits is involved. These profits can be recover-

ed in the action of ejectment, and when claimed in that action, the proof must be limited to such as accrued subsequent to the ouster alleged—or, in other words, the occupation of the defendant. When they are claimed in an independent suit, the record of recovery in the ejectment is, as to the title, only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had. The rule is otherwise at the common law. The necessity of proof of title at the date of the alleged demise rendered the judgment conclusive of such title. This proof not being required in our practice, a corresponding change in the conclusiveness of the judgment follows. With us the judgment is only conclusive of two points: the right of possession in the plaintiff, and the occupation of the defendant at the institution of the suit."

In Mann v. Rogers, 35 Cal. 316, it appeared that in July, 1864, the defendant Rogers instituted an action of ejectment against the plaintiff Mann, to recover possession of the land in question, and in February, 1865, Rogers recovered a judgment in said action for the possession of the land sued for, and the next month Rogers was placed in possession and Mann evicted. In the second action the plaintiff declared against Rogers to recover possession of the land. The answer set up in bar the recovery against the plaintiff, as defendant, in the former action of ejectment.

It appeared that the land in question was a portion of a larger tract granted by the Mexican government to one Vallejo, which grant had been finally confirmed, but there had been no final survey or patent under the decree of confirmation; that on the 13th of October, 1865, subsequent to the judgment in the former action and prior to the commencement of the latter action, the plaintiff in the latter action (defendant in former) by proper mesne conveyances had acquired Vallejo's title to the land in contest. The court say:

"The defendants insist that the former recovery in ejectment is a bar to this action. But this proposition is not maintainable. The title to the land, when that action was pending, was in Vallejo or his grantee Steinbach, and not in the plaintiff. The judgment in ejectment precluded the plaintiff in this action from asserting in another action any legal title which he held or could have made available on the trial of the former action, but does not debar him from asserting a subsequently acquired title which was not in issue and could not have been put in issue in that action. The plaintiff having acquired the title of Vallejo, after the former action was decided, is not precluded from asserting it in this action. A judgment in ejectment is not conclusive, except as against defenses actually made, or legal defenses which might have been made on the trial, but do not preclude a defendant from asserting a title subsequently acquired. This is well settled in this court."

The case of Mahoney v. Van Winkle, 33 Cal. 448, was thus: In 1861 one David Mahoney commenced an action of ejectment against the defendant Green, who answered with a general denial and an averment of title in himself. The case was tried and judgment passed in favor of the plaintiff against the defendant Green, "*for the recovery of the possession of the premises described in the complaint.*" Afterward Green acquired title from the United States by pre-emption, and Mahoney brought ejectment against him. The court say:

"It is insisted that the defendant can not go behind the judgment in the ejectment suit brought against him by Mahoney. The answer to this objection is obvious. The thing forbidden is not attempted here; a new event has happened since Mahoney v. Green was tried and adjudged, and the legal effect of the event is to confer upon the defendant a present right of possession, a right which he did not have at the time of the bringing of ejectment, nor at its conclusion."

"The general rule is well settled in this state and elsewhere that, when title is *put in issue and tried* in an action of ejectment the judgment will conclude the

parties and their privies from again litigating *the same title* in another action between the same parties or their privies. If it were conceded, therefore, that the title which the plaintiffs (who were defenlants in the former action) now hold under their patents is the same title, within the true meaning of the rule, which was in issue, or might have been asserted in the former action, there would be an end of the argument. But in my judgment it is not the same title, within the sense of the rule. While proceedings by the federal government were in progress, plaintiff was liable to be harrassed with litigation in the state courts, impugning his right to the possession. He had no means of preventing such litigation, and when his title and right to the possession were attacked in an action of ejectment, he had no alternative than either to surrender his estate or defend himself as best he might before the state court and jury upon his incipient title, with perhaps vague and ill-defined boundaries. Nor had the state court the necessary machinery or the requisite jurisdiction to investigate and determine the nature and legal effect of Amesti's title so as to conclude him by its judgment from afterwards asserting it when found to be valid and ripened into a perfect title by the tribunals of the United States. These tribunals alone in the last resort could pass an authoritative judgment upon his title or estate, *and when they invested him with the complete title he acquired a new status which he had not before.* I am not, however to be understood as holding that the state courts may not, in any case adjudicate rights claimed under unconfirmed, inchoate Mexican grants. All that the exigencies of the present case requires to be decided, and all that is intended to be decided, is that if such adjudication be adverse to the claimant, the judgment will not conclude him from asserting his rights in a new action after his claim shall have been finally confirmed and patented."

Amesti v. Castro, 49 Cal. 325.

All of the above cases were prior to the adoption by Dakota of the California code.

Thus it appears by authoritative decisions that, under the

Dakota code, the maxim "the plaintiff in ejectment must recover upon the strength of his own title," has no application.

The following cases from that state also seem to us persuasive:

The case of Peoples Savings Bank and Griffin v. Hodgdon, 64 Cal. 95, was thus:

In 1868 the present defendant Hodgdon commenced an action of ejectment against the plaintiff Griffin and others, to recover the possession of a block of land, including the land here in question. In that action she answered denying that Hodgdon had any right or title to the land, and alleged herself to be the owner in fee. Judgment was rendered in favor of Hodgdon for the recovery of the land and Griffin was dispossessed, and Hodgdon placed in possession. All the while the land was subject to a mortgage which was foreclosed after the commencement of the prior action, and in 1870, before the judgment in the ejectment suit, Griffin took a deed under the foreclosure, but did not file a supplementary answer. The court say:

> "It is true that the conveyance was made intermediate the filing of her answer in the ejectment suit and the trial of the action, but the title she got by the conveyance was not the same title she had when the suit was commenced and when her answer was filed. The title she got (under foreclosure) conveyed to her the absolute fee of the property. *This title she did not hold at the time she joined issue in the action. It was therefore not involved in that action and was unaffected by the judgment therein rendered.*"

In Thrift v. Delaney, 69 Cal. 188, it appeared that on January 20th, 1879, while the land in controversy was public land of the United States, the plaintiff completed a homestead entry ac-

cording to the laws of the United States. On April 15th, 1879, the defendant in the later suit commenced an action against Thrift to recover from him the possession of the land covered by his homestead entry. In the complaint it was alleged that the plaintiff was the owner and seiezd in fee of the premises, and that defendant had entered and ousted him therefrom. The defendant appeared and for answer to the complaint denied that plaintiff was the owner or seized in fee of the premises, or entitled to the possession thereof. Upon the trial the plaintiff offered no evidence of paper title, but relied solely on evidence of prior actual possession and enclosure of the land. The defendant contested his right to recover on that ground, but offered no evidence of his homestead entry. The court found and adjudged that the plaintiff in that action was *the owner* of the premises sued for and entitled to the possession, which was delivered to him under a writ of restitution.

Afterwards, on November 5th, 1881, Thrift surrendered his homestead entry receipt and paid for the land in full, and received a patent from the United States, March 15th, 1882, and in November of the same year commenced this action.

The defendant pleaded in bar of the action his former judgment, and the court say:

> "It is insisted by him that when the former judgment was rendered the respondent had perfected his homestead entry, and was in such relation to the source of title that he might have defended successfully against the action, and having failed or neglected to do so, the judgment is conclusive upon all rights he then had or has since acquired to the property involved in it.
>
> "There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters *put in issue and passed on in the action*, conclusive between the parties and their privies, and a bar to another action between the

parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered, and *neither* the parties nor their privies are precluded by the same from showing in a subsequent action any new matters, occuring after its rendition, which give the defeated party a title or right of possession."

"A judgment in ejectment is not conclusive except as against defenses actually made, or legal defenses which might have been made on the trial. It does not deprive a party of the right to acquire a new and distinct title, and, having done so, to assert it without prejudice from the former suit."

Black on Judgments, sec. 656.
Bigelow on Estoppel, 4th Ed., p. 130.

"*Avoiding effect of former judgment.* Whenever, in an action for possession of realty, the question of title is put in issue by the pleadings, the judgment, *prima facie*, constitutes an estoppel to the assertion of any title which existed in the losing party at the time of the former suit. To avoid this estoppel he may show that, by reason of some lease or license, his title could not be asserted in the former suit. Judgment in ejectment never affects after-acquired title. Therefore a defeated party may, in any subsequent suit, show, by parol or otherwise, that the right to the possession has come to him since the former suit."

Freeman on Judgments, sec. 302.

"Where a plaintiff has recovered in an action of trespass *qu. cl. fr.*, such recovery is *res judicata* as between the parties, that plaintiff's possession before the trespass in that suit complained of, was peaceable and prior to defendant's, and of such a character as to entitle the plaintiff to retake it if it could be done peaceably. Such judgment can be used in any subsequent action of trespass to try the title, by either of the parties or their privies, for the recovery of the same land,

and will estop the defendant from alleging the same title in a subsequent action of ejectment. But if the defendant, after the rendition of the judgment, *acquires title by purchase, he is not stopped from alleging that fact;* and such judgment will not be a bar for the reason that the matter in issue is entirely different."

Herman on Estoppel and Res Judicata, Sec. 208.

"It is not the former recovery which constitutes the estoppel. It is the decision of the question which was in contestation between the parties, and the estoppel rests, in ejectment as well as in other cases, upon the familiar principle that when the same point has been litigated between the same parties, and decided by a court of competent jurisdiction, it can not be again called in question. *The same principles apply to defenses as to the plaintiff's title, and a former judgment does not deprive the defendant of the right to set up a subsequently acquired title as a defense.* To sustain a plea of former action pending, it is conceded that it must appear to the court that the first action is for the same cause as the second. This requirement is strictly enforced. It is not enough that the property in controversy in both actions is the same."

Dawley v. Brown, 79 N. Y. 390.

"A judgment in ejectment rests upon the title in being at the commencement of the suit."

M. C. R. Co. v. McNaughton, 45 Mich. 87.
Snyder v. Hemingway, 47 Id. 549.
Hemingway v. Drew, Id. 554.

Counsel says, upon page 19 of his brief:

"*In this case* both parties claim under the same source of title—from a common grantor. Both admit that the land belonged to the United States on July 2, 1864."

Yes, in this case, they do, but in the former action they

did not. Plaintiff said it had a right of way, but *did not* say that it obtained it from the United States or that the United States owned the land July 2, 1864, or at any other date, or that it was public land or ever had been, and it said that defendant was a trespasser and the tenant of trespassers. It did not connect the title of either party with the United States, nor did it mention the United States, except by way of inducement in setting out its corporate existence.

The trouble with the hypothetical case, stated by counsel upon page 20 of his brief, is that it has no application to the case at bar. Here A did *not* declare "that C, being the owner of the land at a certain time, made on a day named a valid conveyance to A," nor was it "adjudged that such conveyance is good and passed to A a title to the property, or at least what interest C had." The premises are false and with them falls the conclusion.

The last proposition of counsel is that, assuming that there was a conclusive adjudication as to part of the premises in question, defendant in error is thereby precluded from asserting even an after acquired title to the rest. He could not, it is said, "by taking possession consecutively of small pieces of one entire parcel of land compel the company to re-litigate with him as to each piece its title, which attached to the whole if it attached at all." That is not this case, but if it were, why could he not, if he had a different title to each, if the holder of a coupon bond can maintain successive suits upon the coupons and another upon the bond? This court has repeatedly held that that could be done.

Referring now to authorities cited in behalf of plaintiff in error upon this branch of the case, we have to say as follows:

In the case of Bryan v. Kennett, 113 U. S. 179, the plaintiff attacked the defendant's title upon three grounds, "*first*, it was not competent for the bank to have Austin's interest sold under execution on a judgment while it held a mortgage on part of the premises sold and thus cut off his right of redemption; *second*, the sheriff's deed to Ross was void for want of a seal or scroll affixed thereto; *third*, the deed from the bank was not under its corporate seal; and these matters all appearing upon the fact of the record, in the suit of Deane v. Bryan, instituted in 1836, no title passed by the decree therein, even if the court rendering it had jurisdiction." The court, Mr. Justice Harlan delivering the opinion, said:

> "These propositions were *necessarily involved* in the determination of that suit, and, so far as they impeach the correctness of that adjudication, are not open to re-examination in any collateral proceeding between the same parties or their privies."

We do not understand upon what theory counsel has cited Davis v. Brown, 94 U. S. 423. Substantially such a proposition as he here contends for was advanced in that case, and in reply thereto the court say as follows:

> "When a judgment is offered in evidence in a subsequent action between the same parties, upon a different demand, it operates as an estoppel only upon the matter *actually at issue and determined in the original action.*"

In the case of Hornbuckle v. Stafford, 111 U. S. 389, the contest was as to whether Stafford was entitled to thirty-five inches of the water of Avalanche creek, *in his own right*, or whether he held such right *in trust* for the company. There had been a former action of Gallagher v. Basey, (20 Wall. 670), from the report of which it appears that at the May term of the district court of the territory, in 1871, the court heard the whole case "on the pleadings, evidence and proceedings

therein, and the findings of the jury"; and, in July, 1871, rendered a decree adjudging that Stafford was entitled to the thirty-five inches of the water. The court say:

> "A copy of the complaint and answer in the case of Gallagher v. Basey and others is set out in the bill of exceptions. An inspection of the excluded testimony shows that the complaint and answer do not in any decree tend to support the contention of appellants, to-wit, that the thirty-five inches of water awarded appellee by the decree was awarded to him *in trust* for the Hellgate & Avalanche Ditch Company. The company is *not mentioned in the pleadings*, and there is no averment that the appellee held the water right claimed by him for any one but himself."

> "While, therefore, the appellants were entitled to put the complaint and answer in evidence as a part of the record, it is clear that the exclusion of the pleadings in no degree prejudiced their case. The decree will not be reversed for such an error. Gregg v. Moss, 14 Wall. 564.

> "The apellants next contend that the decree should be reversed because the court excluded evidence offered by them to show that the consideration on which the appellee became a member of the Hellgate & Avalanche Ditch Company, was the conveyance of his water right in Avalanche Creek to the company. The evidence was properly excluded, because this issue had been passed upon in the case of Gallagher and others v. Basey and others, between the same parties, and decided, as appears by the decree of the court, against the contention of appellants."

In Chapman v. Smith, 16 How. 114, the defendant sheriff and his sureties were sued for neglect in levying an execution, and the branches assigned were, *first*, that there were goods of the defendant in the execution of which the sheriff could have levied the money, but that, not regarding his duty, he neglected and refused so to do; *second* and *third*, that he did make a levy upon the goods but neglected and refused to sell

the same. It appeared that, in a former proceeding under the statute of Alabama, an issue had been formed upon the charge of the plaintiff against the sheriff for returning the execution without having levied the money thereon, and that the same might have been collected if due diligence had been used by the sheriff, and that, upon the trial, the jury found in favor of the defendants. The court say:

> "Here we can not help seeing that the matters sought to be put in issue by the replication are those *necessarily involved* in the former trial, and to uphold it would be to permit the same facts to be adjudicated over again."

We have already cited and quoted from Packet Co. v. Sickles, 5 Wall. 580.

In Miles v. Caldwell, 2 Wall. 35, the court say:

> "The defendant alleges 'that both questions *were submitted to the jury* and decided against complainant in the action of ejectment, the judgment in which is now sought to be enjoined. Of the fact of such submission and finding there can, in this case, *be no doubt* Under the instructions of the court, which are in proof in this record, if the jury found either of these issues in favor of Caldwell, the plaintiff was not entitled to a verdict. The plaintiff, however, did get a verdict. *It thus appears conclusively that the jury found that there was no fraud in the second mortgage, and that the first had been satisfied.*"

In Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, the court held, Mr. Justice Brown delivering the opinion, that a judgment for the defendant in an action for taxes for *one* year, on the ground that the property was exempt, was not a bar to an action for taxes on the same property for *another* year.

In Nesbitt v. Ind. Dist., 144 U. S. 610, the court held that

interest coupons form separate causes of action from the bonds themselves, and that a prior judgment on the coupons that the recitals of the bonds prevented the defense of a prior indebtedness beyond the constitutional limit, does not, in an action on the bonds, preclude that defense. This case quotes from Cromwell v. County of Sac, and we have quoted from it, (*supra*).

The case of Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, involved the validity of a tax assessed upon a branch road, in the year 1891, under an act passed that year. The company pleaded in bar a judgment in a former action holding that a portion of the main line was exempt from taxation for a prior year. In the opinion delivered by Mr. Chief Justice Fuller, the court say:

> "The distinction between the road from Halifax to Weldon, and the main road from Wilmington to Halifax, was not adverted to; and even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case *can not operate as determining what might have been but was not brought in issue and passed upon.*"

The reference to Smith's Leading Cases, and the English case of Outram v. Morewood, are, as we think, sufficiently answered by the reference thereto in prior decisions of this court.

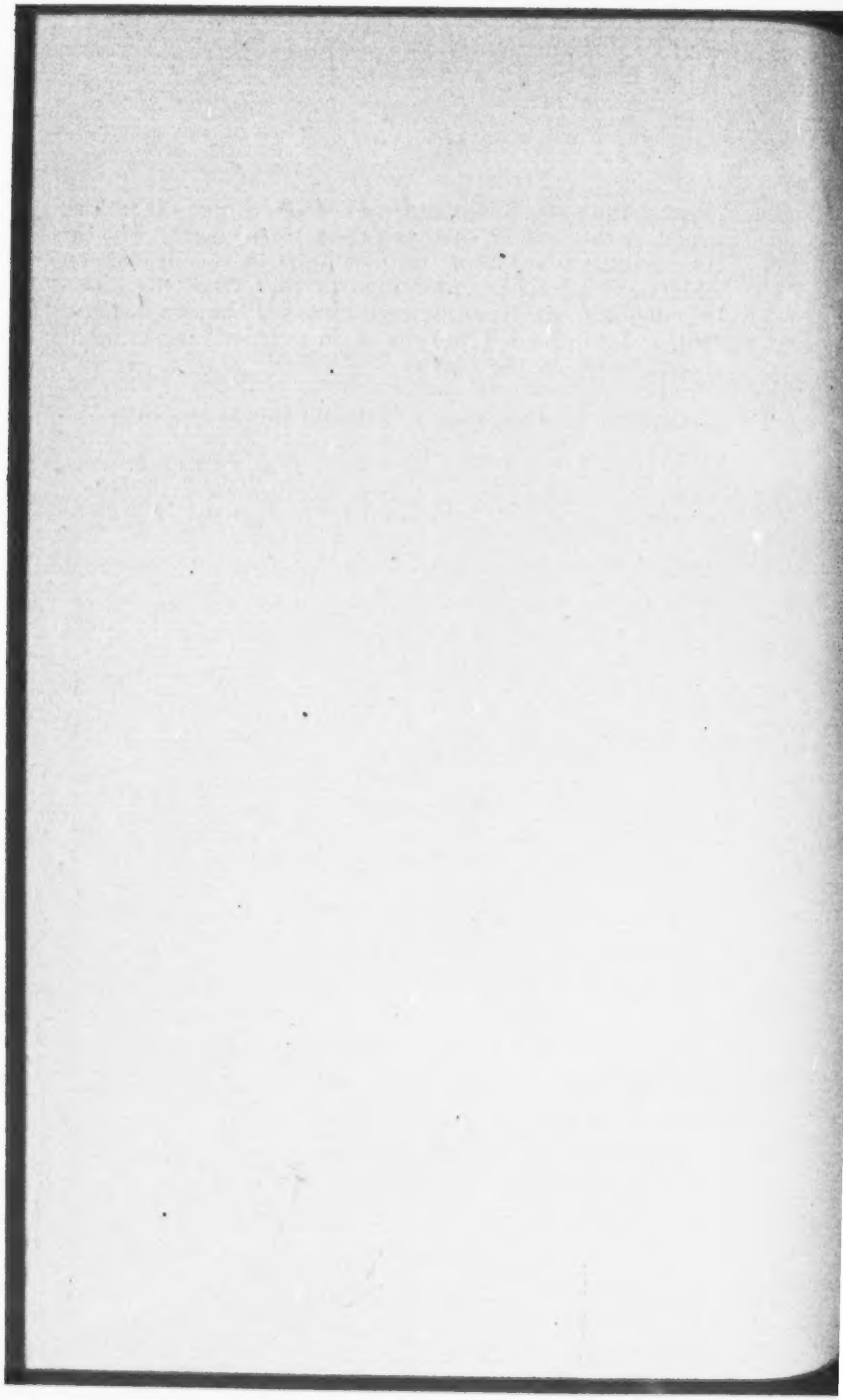
Counsel also cites Aurora City v. West, 7 Wall. 82, and Beloit v. Morgan, Id. 619. Both of these cases were cited in the dissenting opinion in Cromwell v. County of Sac, and, in so far as they contravene any proposition established by that case, must be considered as unavailing; but the following quotation from the former seems to us to show that there is nothing therein opposed to our contention.

"Courts of justice, in stating the rule, do not always

employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties." * * *

The distinction between such a case and this is evident.

H. F. STEVENS,
Counsel for Defendant in Error.



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MAR 4 1898
JAMES H. McKENNEY,
CLE.

Br. of Stevens for D. E.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

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No. 93.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

Brief for Defendant in Error, on Re-Argument.

H. F. STEVENS,
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

No. 93.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

RESPONDENT'S BRIEF ON RE-ARGUMENT.

The case having been ordered to be re-argued attention has been directed to three questions, viz:

> 1. Could occupants of public lands before they were surveyed and declared open for settlement, by subsequently availing themselves of the town-site act, procure a title paramount to that of a railroad company which, under a previous grant by congress, had taken possession before the town-site patent was granted?
>
> (See Northern Pacific Railroad Company v. Colburn, 164 U. S. 383.)

2. Assuming that the town-site title was, in point of law, prior to that of the railroad company, could the city of Bismarck or its grantees maintain an action of ejectment against the railroad company?

(See Roberts v. N. Pac. Railroad Company, 158 U. S. 10.)

3. Could Patrick R. Smith, as a grantee from the city authorities, subsequent to the actual possession by the railroad company, maintain either ejectment or an action for the value of the land?

We shall, in the main, confine ourselves in this brief to the matters suggested by said questions. Before referring to the pertinent facts we call attention to the following statutes:

R. S. § 2387—

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court, for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

Chap. 67, Laws Dakota, 1862.

"Section 1. Any person settled upon the public lands belonging to the United States on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done to the same, also an action

to recover the possession thereof, in the same manner as if he possessed a fee simple title to said lands."

Chap. 15, Laws Dakota, 1868.

"Provided further, that the damages accruing to any occupant or owner, or other person who may reside or have improvements on said lands, shall be determined and paid by said railroad company as heretofore provided in this subdivision."

Also the following additional extract from Section 7 of the charter of the Northern Pacific Railroad Company:

"And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth."

It is important that the facts in the case be clearly understood by the court and that, if the record be not solely resorted to for that purpose, no misstatements should prejudice the rights of either party. Counsel for plaintiffs in error, in both of his briefs, as it seems to us, has made statements which would have that effect if not corrected.

We trust the court understands that the premises in question constitute a business block in the heart of the City of Bismarck, occupied for commercial purposes, and that there is nothing in the record to show that a foot of it is or ever was occupied by tracks, road-bed or depot grounds, and that there is not and never was a track within more than twenty feet of any portion of it.

The statement in the findings that "the railroad was constructed across this tract in 1873," REFERS TO THE EIGHTY-ACRE TRACT, NOT THE PREMISES IN QUESTION.

I.

The judgment should be affirmed unless the record affirmatively shows error.

We are content to abide by the record, and, if it is meagre in any respect, we submit that that fact does not furnish ground for reversal. As we understand it, the question before this court is not: "Does it affirmatively appear from the record that the plaintiff below was entitled to recover?" but rather, "Does it affirmatively appear from the record that the courts below erred in their judgment?" for, as said in Burr v. Des Moines Co., 1 Wall. 99: "The legal presumption is in favor of the correctness of the judgment below." And, in Lumber Co. v. Buchtel, 101 U. S. 633, "It was for the defendant to see that findings were had on all matters material to the defence, as it was for the plaintiff to see that findings were sufficient to support a judgment in his favor." The plaintiff did this by seeing that they contained a statement of a full and clear record title in himself.

In Campbell v. Boyereau, 21 How. 759, it was said that "where no question of law or fact is sufficiently presented for review, as the circuit court had jurisdiction of the subject matter and the parties, its judgment must be presumed to be right," and, in N. Y., etc. Mining Co. v. Frazer, 130 U. S. 611, that "to obtain a reversal of a judgment, it is necessary that the fact upon which such reversal is claimed should appear from the record, sufficiently to be passed upon."

And, in Stanley v. Supervisors, 121 U. S. 535, "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the arguments that, upon the evidence, the findings should have been different."

II.

The court below has found that these premises were entered and were conveyed to plaintiff under the townsite act. (R. S. Sec. 2387). This fact implies a valid entry and a valid conveyance, and neither is collaterally assailable.

From such finding, this court, as it seems to us, must conclusively presume the truth of the recitals of the deed, which we may presume was introduced upon the first trial, before the jury, and that the same, after reciting the entry and subsequent proceedings in compliance with the territorial statute, proceeded as follows:

> "And whereas * * * it appears that the lot, tract "and parcel of land hereinafter described, being a por- "tion of the same entered by me in trust for the occupants "of said townsite, was and is occupied and improved "by Patrick R. Smith, of Bismarck, in said County of "Burleigh, and that he is entitled to a deed therefor, "Now, therefore, in execution of the trust vested in me by "said act of congress, and in pursuance of the laws of "the territory of Dakota, in consideration of the premises "and of *five dollars* to me in hand paid by Patrick R. "Smith, the occupant of said tract, I, George Peoples, "mayor of said city of Bismarck, have granted, sold and "conveyed, and by these presents do grant, sell and con- "vey to Patrick R. Smith, of the said city of Bismarck, "all the following described lot, piece and parcel of land, "situate, lying and being in the county of Burleigh and "territory of Dakota, and described as follows, to-wit: "(description of premises in question)."

The following authorities, we think, support this proposition:

In Chever v. Horner et al, 142 U. S. 122, referring to the townsite act, the court quoted with approval the following language of the supreme court of Colorado:

> "Under the acts of congress above mentioned, and the provisions of the act of the territorial legislature in aid thereof, the probate judge, holding the title to the

townsite in trust for the beneficiaries, *was authorized to convey the lots and parcels of land therein to those entitled to the same.* This was a general jurisdiction over the subject matter, analagous to the jurisdiction of the land department of the government over the issuing of patents of lands subject to entry under the land laws of the United States. Being invested with title and jurisdiction, Probate Judge Downing conveyed the lot in controversy to John Hughes, from whom appellee Horner deraigned title, more than seven years prior to the conveyance by his successor, Judge Kingsley, to the appellant, Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face, and purports to have been executed in pursuance of the authority vested in the grantor, *it is not open to attack in this collateral proceeding for defects or omissions in the initiatory proceedings.*' And it was accordingly held, as the deed was of that character, that the presumption was that the proper initiatory steps had been taken in conformity with law."

And in U. S. v. California & O. Land Co., 148 U. S. 31:

"It is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus, in the case of U. S. v. Arredondo, 6 Peters 691, 729, this court said: 'It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decisions made or the acts done by the tribunal or officer, whether executive, (Marbury v. Madison, 1 Cranch, 170, 171), legislative (McCulloch v. State, 4 Wheat. 423; Satterlee v. Matthewson, 2 Pet. 412; Bank v. Billings, 4 Pet. 463), judicial (Perkins v. Fairfield, 11 Mass. 227; McPherson v. Cunliff, 11 Serg. & R. 429, adopted in Thompson v. Tolmie, 2 Pet. 167, 168), or spe-

cial (Rogers v. Bradshaw, 20 Johns 739, 740; Shand v. Henderson, 2 Dow, 521, etc.) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

Such also is the uniform doctrine of the states and territories in which the act has been chiefly operative.

In Sherry v. Sampson, 11 Kan. 611, the supreme court said:

> "When the probate judge has made a deed for any portion of said lands to any person, it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person; and a person who has no interest in the land will not be allowed to raise any question as to whether the probate judge has made the deed to the proper person or not."

Again, in Mathews v. Buckingham, 22 Kan. 166:

> "As the law presumes that every man in his private and official character does his duty until the contrary is proved, both the patent and the town company deed were properly admitted."

And, in Riggs v. Anderson, 47 Kan. 66:

> "The legal title to the townsite passed from the government to the probate judge, and from him to the town company; and the latter had issued a certificate by which it parted with all its interest in the lot in question, except conveying the legal title, which it held for the benefit of the certificate holder, his heirs or assigns. It will be presumed that the probate judge deeded the land to the proper party."

And, in Marysville Inv. Co. v. Munson, 44 Kan. 491:

> "When the probate judge has made a deed for any portion of said land to any person, *it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person;* and a person who has no interest in the land will not be allowed to raise any question as to whether the probate judge has made the deed to the proper person or not. See also Marysville Inv. Co. v. Hall, 49 Pac. 332."

In Tecumseh Townsite Cases, 3 Neb. 267, the court said:

> "The trustee under said legislative act, in deciding who are entitled to lots under the trust, acts in a judicial capacity, and his decision can not be assailed in a collateral proceeding, though it may be impeached for fraud. Where a statute, which confers the means of acquiring the right, prescribes an adequate, special, mode of determining by judicial investigation the fact upon which the right depends, that mode is exclusive."

And, in Green v. Barker, 47 Neb. 934

> "It is insisted that it should have been shown that the city of Grand View had been incorporated, and that the parties to whom transfers had been made were occupants of the premises or portions of the property conveyed to them; or, in other words, it was necessary that proof be made that the parties to whom the deeds were made were the proper ones, that all the acts to be performed had been done, or the facts required to exist by the statute were existent at the time of the execution of the deeds. These were matters to be investigated and determined by the person holding the trust, and upon whom it devolved as a duty, on demand by the proper party, to make a deed,—in this case, the chairman of the board of trustees of the city,—*and his settlement of the question was not subject to collateral attack.*"

In Anderson v. Bartels, 7 Col. 256:

> "In an action of ejectment for part of a townsite on the public domain, a deed which is regular upon its face and executed by the officer entrusted by the government with the legal title, and duly authorized to convey it, is not impeachable for failure to comply with any preliminary requisites."

And in Murray v. Hobson, 10 Col. 66:

> "Whether the title was rightfully conveyed to the grantee, is a question for the city authorities, and not for one not then a beneficiary of the trust."

In McCormick v. Sutton, 97 Cal. 372, the court said:

"When a patent has issued to a townsite, a deed from the town authorities of a town lot carries to the grantee a perfect title, when no mine had been discovered and the land was not known to be mineral at the date of the patent. (Davis v. Weibbold, 139 U. S. 507) and the regularity of the conveyance from the authorities of the townsite to the claimant of a town lot can not be afterwards questioned collaterally."

In Ming v. Foote, 9 Mont. 201, the court said:

"*By the terms of the grant the probate judge was the officer and representative of both the federal and the territorial governments in the disposal of these lands.*"

In Tucker v. Whittlesey, 74 Wis. 74, the court said:

"On the part of the defendants an effort was made to prove that the premises had never been occupied as required under the townsite law; but this was not an open question, so far as the defendants were concerned."

And, in Tucker v. R. R. Co., 91 Wis. 576:

"The powers and duties of the county judge under this act are analogous to those exercised by the land department of the United States in granting a patent, and the execution of a deed by such judge is substantially an official determination, which he is authorized to make, that all the requirements preliminary to the execution of the deed have been complied with, and that the person to whom it has been issued is entitled to it. No one who is not a beneficiary of the trust, but a mere stranger to the title, as the defendant is here, can call in question the validity or regularity of such conveyance, or, by subsequent entry or intrusion upon the premises, put parties claiming under such conveyance to the proof whether all the steps prescribed by law have been taken, or whether the party to whom the deed was executed was the person rightly entitled thereto. These questions can only be litigated by some one interested in the trust, and by direct proceedings for that purpose. Taylor v. R. R. Co., 45 Minn. 66; Murray v. Hobson, 10 Colo. 66; Ming v. Foote, 23 Pac. 515; Cheever v. Horner, 11 Colo. 68; Smelting Co. v. Kemp, 104 U. S. 640; Moffat v. U. S., 112

U. S. 24. These and many other authorities that might be cited to the same effect are quite sufficient to show that the deed from the county judge to Whittlesey and Tucker was not open to collateral attack by the defendant."

In Taylor v. R. R. Co., 45 Minn. 66, the supreme court of Minnesota said:

"The execution of a deed to a part of a townsite by the judge, who is trustee for that purpose, is analagous to the grant of a patent by that department of the government whose province it is to supervise the various steps necessary to be taken to obtain title. The execution of a deed by the judge is in the nature of an official declaration and determination by him that all the requirements preliminary to the execution of a deed have been complied with, and that the person to whom it is issued is the person entitled to it. The doctrine of presumptions in favor of official acts obtains,—that the judge did his duty in all respects, and had required the grantee to show by legal proofs that he was the party entitled to a deed, and that he had complied with all the necessary pre-requisites to its execution. Moreover, when a trustee in whom is vested the land constituting a townsite, in trust for the occupants, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, no one who is not a beneficiary of the trust but a mere stranger to the title, as is the defendant here, can call in question the validity or regularity of such conveyance, or, by subsequent intrusion upon the possession, acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. Anderson v. Bartels, 7 Colo. 256; Murray v. Hobson, 10 Colo. 66; Cheever v. Horner, 11 Colo. 68; Matthews v. Buckingham, 22 Kan. 166; Ming v. Foote, 23 Pac. R. 515; Whittlesey v. Hoppenyan, 72 Wis. 140; Smelting Co. v. Kemp, 104 U. S. 636. The rule contended for by the defendant would not only be against all precedent, but would lead to the gravest practical evils. If mere intruders or strangers to the title under the trust could compel the party holding under the trustee in every suit for possession to prove that the grantee was the beneficiary of the

> Trust, and that the trustee had complied with all the requirements of the statute, then, of all titles, those under these town-site entries would be the most uncertain and unreliable; and the lapse of time would only render them more so, because of increasing difficulty in making proof of the facts."

The case of Ashby v. Hall was *not*, as we understand it, one of collateral attack upon a deed from corporate authorities to an original occupant. Plaintiffs had received deeds of their lots according to a plat in existence at the time of the entry of the town-site, according to which their lots abutted upon an alley. Afterwards the authorities made a *new plat* which purported to vacate the alley and embraced it within the limits of one of the *new lots*, which they assumed to convey to defendant, who enclosed it by a fence. Plaintiffs sued to abate the obstruction and succeeded; the court holding that "the entry of the platted town-site carried with it the right of way over streets and alleys shown thereon. The streets and alleys were not afterwards at the disposal of the government."

III.

The court below has not found that defendant ever occupied any part of the premises in question.

The only affirmative statement in the findings connecting the railroad company, as such, in any way, with the lots in question is that they "are within 200 feet of the main track of this railroad, as actually constructed." If, as is usual, the lots are but 150 feet deep, it does not follow that any portion of them is nearer than 50 feet to the track. The negative statement that "no part of the same, except the rear 25 feet thereof, has ever been occupied for railroad purposes," is not sufficient under the authorities above cited.. Would it be sufficient ground for reversal of a judgment in favor of a plaintiff in

ejectment that it appeared that "no portion of the premises in question, except the rear 25 feet thereof, had ever been owned by defendant"?

We further assert that it nowhere even inferentially appears that the railroad company ever had possession of any portion of the premises in question prior to Dec. 1, 1885.

The original reply, as we think we can demonstrate to the satisfaction of the court, admitted unlawful possession by defendant "*through its tenants*," for a period of EIGHT (not eighteen) years, prior to the commencement of the action, but the complaint alleges (Fol. 3½) "That said defendant, more than six years prior to the commencement of this action, wrongfully and unlawfully went into possession of the premises * * and that the use and occupation thereof *during said time* was worth at least $5,000 a year." Six years, as we have already stated, is the statutory period of occupation for which such an action can be maintained. That, therefore, is the "period in question" in this action, as intended by the court in its findings (Fol 19) and not eighteen years, as erroneously assumed by counsel for plaintiff in error.

While the complaint alleges that plaintiff became seized in fee on Sept. 14, 1876, it was unnecessary to have alleged such seisin prior to Dec. 28, 1885, and it could not truthfully have alleged it prior to date of entry, for, as held in Ashby v. Hall, 119 U. S. 526, that was the date of the commencement of plaintiff's "estate in fee". The court in that case said:

> "The right of way, and all appurtenances to the lots, which were held by the occupants under their possessory claims, *continued after the entry*, and the receipt of their deeds, or other evidence of title, as before, *with the additional support* arising from the change of their *possessory claims to estates in fee.*"

It was enough for the purposes of this action to allege title. It was not necessary to allege source or duration of title. That was matter of proof, and the finding of the court that the premises were entered under the townsite act, (R. S. §2387) by the corporate authorities and by them conveyed to the plaintiff, implies that, at the date of the entry and at all times before, plaintiff was the occupant; because, as we have seen, they could be entered only for the benefit of, and conveyed to, the *occupant*.

IV.

No question as to the efficacy of the townsite settlement, entry, patent and deed is available here, because not raised below.

This proposition is submitted with great deference, but we cannot escape the conviction that the questions suggested by the court have been occasioned by the fact that the record is meagre in that respect. This is due to the fact that, until counsel for plaintiff in error, in his supplemental remarks, on the second day of the former argument, raised the point, the effect of the townsite proceedings was never questioned, but, throughout two trials in the circuit court and two arguments in the circuit court of appeals, IT WAS ASSUMED THAT PLAINTIFF'S TITLE WAS SUFFICIENT, UNLESS THE FACT THAT THE RAILROAD WAS CONSTRUCTED WITHIN 200 FEET OF THE PREMISES GAVE IT A PARAMOUNT TITLE, NOTWITHSTANDING THE FILING OF ITS MAP OF DEFINITE LOCATION ELSEWHERE.

The case of Houghton v. Jones, 1 Wall. 702, was an action of ejectment where the plaintiff deraigned her title from the Mexican government and it did not appear from the record that the grant was ever confirmed according to law by the board ap-

pointed for that purpose, or was ever presented to the board for its consideration. Speaking of the contention of counsel for reversal upon this ground, Mr. Justice Field, delivering the opinion of the court said:

> "His position is, that under the act of March 3rd, 1851, if the grant were not presented within the period there designated, which period had expired when this action was commenced, the land was to be deemed a part of the public domain, and that no presumption is to be indulged in in respect to such presentation, in the absence of any averment on the subject. *It is a sufficient answer to this position, that it does not appear from the record to have been urged in the court below.* It may be that the objection was not taken, from the knowledge of the parties that the grant had been confirmed, and that proof of the fact *could be readily produced.* Objections of this kind can not be heard for the first time in the appellate court. To entitle objections to consideration here, they must be presented to the court below, in the first instance, at least if they are of a kind which might have been there obviated."

So, in Springer v. United States, 102 U. S. 593, the court said:

> "The point was not brought to the attention of the court below and cannot, therefore, be insisted upon here."

V.

But, if we are wrong in this position, then, in view of the questions to which the court has specially directed attention of counsel, we respectfully request the court to bear in mind:

1. That the townsite in question was located on an even-numbered section, no portion of which was ever granted to the railroad company, unless it had an unlimited and continuing grant of right of way.

2. That "possessory rights" of occupants of the townsite attached in the year 1872, to which date the subsequent entry, patent and deed related back,

3. That plaintiff never "purchased" the premises in question and never was the "grantee" of the City of Bismarck, in the ordinary sense of those words;

4. That the action was not brought to recover damages for the taking of plaintiff's land for the right of way of a railroad, but to eject defendant from a city business block, and to recover as damages the value of its wrongful use and occupation for a period of six years prior to the commencement of the action, which is the period allowed by the statutes of Dakota, and not to recover any damages for its future use.

5. That the use of the words "eighteen years" in the printed record of the reply (Fol. 8) is a mistake and that the original reply reads "eight years."

VI.

Rights of town-site occupants as affected by change of location.

There can be no possible doubt that the definite location and grading elsewhere exhausted the company's rights under its charter grant of right of way.

It is not necessary for us to deny that, even then, if the company had changed its location to a tract of public land free from any claim of others, no individual could question the change so long as the government sees fit not to do so.

It was upon such grounds that the decision in Washington & I. R. Co. v. Cour d'Alene R'y N. Co., 160 U. S. 77, proceeded. The court say:

"It further appeared that the land in question was *occupied by the railroad, side-tracks and depot* of the defendant, and that *neither the plaintiff nor any person for it ever made or did any act upon the premises or took any possession thereof.*" And "Regarding this question as *one entirely between the Cour d Alene Railway and Navigation Company and the United States.* * * * no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened." And again, "If the United States could not and do not complain there is no foundation for the plaintiff company to do so."

But what was the situation here? In *1872* a town-site was platted on an *even-numbered* section and occupied, and 30 buildings erected thereon, and the improvements rapidly progressed (Fol. 18). In May, 1873, the railroad company filed its map of definite location and the same was duly accepted and approved, covering the line of its grading, two miles south of the town-site. *Up to that time* its grant was "afloat", and the townsite occupants and all others located upon what were public lands at the date of its charter, were liable to be dispossessed. *From that moment* that liability ceased. The grant which had previously been "afloat" became "definitely located." From that moment the occupant of every foot of the eighty-acre townsite tract held a "possessory right" which was paramount to the rights of every one else except the government. An inchoate right, which had its inception in the first occupancy for townsite purposes, became *vested* even as against the government when the entry was made, and *absolute* when the patent issued, which related back to the inceptive act of original occupancy for the purpose of cutting off all intervening claims.

It was not essential that the townsite occupants' rights intervened between the date of the definite location and the

change of line, for those rights were created, not by *estoppel*, but by the townsite statute.

But, even if it were, the townsite patent and deed, as we have seen, until directly assailed, raise the presumption, if necessary, in aid of the judgment, that his rights *did* so intervene.

We think this was distinctly held in Ashby v. Hall, 119 U. S. 526, 529, where the court say:

> "That portion of the town know as Scott's Addition, within which is the alley in controversy, was laid out and platted into streets, alleys, blocks, and lots, as early as 1866; and the lots were occupied, in conformity with that survey and plat, when the entry was made. The right of way, and all appurtenances to the lots, *which were held by the occupants under their possessory claim, continued after the entry*, and the receipt of their deeds or other evidences of title, as before, with the additional support arising *from the change of their possessory claims to estates in fee.* The power vested in the legislature of the territory * * * could not authorize any diminution of the rights of the occupants, when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy."

In Shepley et al. v. Cowan et al., 91 U. S. 330, the court said:

> "But whilst, according to these decisions, no vested right as against the United States, is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

See, also, McCreery v. Haskell, 119 U. S. 327.

In the case of Hussey v. Smith, 99 U. S. 20, it appeared that under this act, in Nov. 1871, one Wells, as mayor of the city of Salt Lake, entered certain lands in the territory of Utah as the "townsite" of said city, wherein was included the lot which was in controversy. The court say:

> "On the 30th day of September, 1868, Job Smith, then and for many years prior thereto in possession of the lot, and the owner thereof, subject only to the paramount title of the United States, executed to one Bernhisel a mortgage of all 'his right of possession, claim, and interest in and to the lot,' to secure the payment of a certain sum of money in one year thereafter. * * * There can be no question that, under the act of March 2, 1867, Smith had an equitable interest in the premises which he could sell and convey."

The Department has held (1 L. D. 503) that

> "It is not necessary that a declaratory statement be filed at all, except to save the rights of the town in the event of a public sale, as indicated in section 2388 Rev. St."

One of the earliest cases arising under the substantially similar town-site act of 1844, and the decision in which has been approved by all the courts in which the question has subsequently arisen, was that of Leech v. Rauch, 3 Minn. 448, where the court said:

> "It will be observed that, before it is lawful to enter land under this law, it must have been settled upon and occupied as a townsite. If such be the case, it may be entered for the 'several use and benefit of the occupants thereof.' This latter clause is in close connection with that prescribing how the land shall be occupied,and it is a natural inference that the occupants referred to in both clauses are the same persons. Government does not part with its title until a certain condition or conditions have been complied with. The condition is that the land has been settled upon and occupied in such manner that it is not 'subject to entry under the existing pre-emption laws.' *When such settlement has been made, the occupants under this act acquire certain*

vested rights. They are entitled to have a trust established and declared in their favor. * * *

"Nor can this right be in any manner affected by any delay on the part of government to recognize it by the proper evidence of title, since the right is in no manner based upon the existence of such evidence. The duplicate and patent are merely the evidence of the existence of the right previously acquired, convenient and perhaps necessary for the enforcement of the right, but not conferring it. *They are the effect and not the cause.*

"It would lead to far greater injustice, by holding that the settlers upon and occupants of a townsite, having complied with all the provisions of the act entitling them to enter the premises, can yet acquire no rights which are not subject to be divested by strangers, *until actual entry of the site.* It would open a wide door to litigation, and go far to defeat the beneficent provisions of the law."

The same court had already held, in Davis v. Murphy, 3 Minn. 119, as follows:

"We are bound to suppose that in order to have become the 'proprietors,' they have done all that the act of congress contemplates, to acquire such an occupation as would entitle them, in preference to any other persons, to claim and receive the land from the trustee. This is certainly an interest in the land, inchoate, it is true, yet nevertheless valuable; it is authorized by law, and laws are made to provide the means of perfecting it into a title in fee. It may be defended against all encroachments from persons not having a paramount right. It is more than a mere right to the possession, because it contains the germs which will expand and ripen into a perfect title."

In Winfield Town Co. v. Maris, 11 Kan. 128, the Supreme Court of Kansas said:

"The act of congress *creates the right* and prescribes who shall be entitled thereto; the legislature provides the rules by which the rights are ascertained and determined. Before there can be an entry the land must be settled upon and occupied by a certain number of in-

habitants. The moment the land is entered the trust *vests an absolute right* in the beneficiaries."

And in Fessler v. Haas, etc., 19 Kan. 216, speaking of the right of a town-site settler before entry, the same court said:

> "It seems to us, under our statutes respecting contracts for the sale or purchase of public lands, and conveyances of improvements upon such lands, (Gen. Stats. p. 184, sec. 9) and the laws of the United States respecting the proving up of townsites for the benefit of the occupants, that it must be held that Fessler had sufficient interest in the property to be reached by process of the courts, and to sustain the attachment."

Again, in Rathbone v. Sterling, 25 Kan. 444, where the opinion was delivered by Mr. Justice Brewer, the court said:

> "We understand the scope of the act of congress, as well as of the state statute to be *to secure to each occupant the lands actually occupied by him.* This is a fixed and vested right; something not resting in the discretion or dependent upon the award of the commissioners; the commissioners are to examine and ascertain who are occupants and what lots they occupy; they do not create the right; they simply inquire as to existing rights."

In Reasoner v. Markley, 25 Kan. 443, the doctrine of the former cases was affirmed and it was further held that

> "A settler and occupant upon a piece of land settled upon and occupied as a townsite under the said act of congress has rights in and to the property, although the title may still be in the United States."

And in Greiner v. Fulton, 46 Kan. 405:

> "As the object of the settlement and occupancy of a townsite is totally different from that of a settlement under the act of 1841, (pre-emption act) no legitimate inference can be drawn that the particular manner or requisites of settlement and occupancy in each case must be the same. And the requisites of the act of 1844 as to settlement and occupancy are complied with when these are such as to attain the object in view, namely, the use

of the land as a townsite for the purposes of trade, commerce or manufactures."

In Railway Co. v. Lynch, 13 Nev. 92, the court said:

"We think the respondent had the right, by virtue of his possessory title to the land, as against everybody except the government of the United States, of this state, or of the municipality of the city of Virginia, to prevent such excavations being made to his injury, unless compensation was awarded for the damages resulting therefrom."

In Jones v. City of Petaluma, 38 Cal. 397, it was held that

"Congress, in the passage of these laws, had in view the individual interests of bona fide settlers upon small parcels of the public lands, as well as the common interests of the community of persons, so contiguously settled as to justify the establishment of a town or city; and did not intend the act for the especial benefit of municipal organizations or corporations. And to so construe the law as to authorize, under its sanction, an appropriation of private property to the public use, without compensation, or an arbitrary confiscation of the rights of property for the benefit of municipal associations or corporations, would be a manifest perversion of the leading object and purpose of the law."

And, in Morgan v. Lones, 80 Cal. 317, as follows:

"It is true, as argued for defendant, that the mere possession of public lands gives no right as against the government. But the government has chosen to convey the land to trustees in trust for the occupants. * * * The question is, what was the class of persons whom the townsite act was intended to protect? The act itself designates such class as consisting of those by whom said lands have been 'settled upon and occupied.'"

From these cases we think it clearly appears that the "inceptive act," in the acquisition of a title under the town-site act is the original occupation. This being so, the doctrine announced in Stark v. Starrs, 6 Wall. 402, applies. It was there said:

> "The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, *it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.*"

There is, we submit, in this case, no question of *vendor* and *vendee*. The *real* title was at all times in the townsite occupant and that of the corporate authorities was held solely for his benefit until conveyed to him. Thus, in City of Cincinnati v. White's Lessee, 6 Peters 179, the court said:

> "At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, *the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee.*"

In the case of Mallard v. Anderson, 36 La. An. 834, the property of a townsite occupant was held to be subject to his debts, even before entry. The court said:

> "Under section 2387 the entry of lands authorized to be made by the corporate authorities of towns 'in trust for the several use and benefit of the occupants thereof' is made for the benefit of such occupants, and the title received is in effect the title of the occupants."

In Cerf. v. Pfleging, 94 Cal. 131, the court said:

> "The act of congress provided that the corporate authorities in such cases might enter the lands 'in trust for the several use and benefit of the occupants thereof, according to their respective interests.' The board, therefore, was a mere trustee for the occupants, and by the terms of the act of congress was to execute the trusts under such regulations as might be prescribed by the legislature. * * * *It is obvious that conveyances of*

the title by the city did not affect the tenure by which the land was held; the title was still the possessory title quieted by release to the occupants of the title of United States. It was still affected by the previous acts of the owners as though no new title had been acquired; but necessarily, as also by express provision of the act, the trustees were required to decide in the first instance who were the occupants within the meaning of the act of congress."

In the case of Village of Buffalo v. Harling, 50 Minn. 551, the court held that the corporate authority had no power to dedicate any portion of the patented land to public use, saying:

"We discover no proof that Taylor ever had any title to or interest in the property, except such as may have been acquired by the patent to him as a trustee, before referred to. If we assume that the land thus conveyed embraced that covered by the plat, still it showed only the conveyance to Taylor of the mere legal title in trust for the occupants of the townsite. It does not appear that he had any beneficial interest in the premises. The conveyance of the title to him as a mere trustee in 1860 would not, by the operation of the principle of estoppel, make effectual any dedication of the property which he had assumed to make."

In Georgetown v. Glaze, 3 Col. 230, it was said:

"The purpose of the act of congress is to vest the estate and trust powers, not in the corporation itself but in some one or more of the corporate officials in their official and politic capacity. Nor by construction of law can the entry in the name of the corporate officials enure to vest the estate in the corporation."

And in Smith v. Pipe, 3 Col. 187, the court said:

"Nor does any technical difficulty arise from the circumstance that the county judge or municipal authority is not for all purposes a corporation, even if this be admitted. The legislative will is not to be frustrated by the application of the technical rules which govern private grants. Rutherford v. Greene, 2 Wheat. 196.

"The grant of the sovereign confers upon the donee

capacity to take according to the purpose and to the extent intended. For instance, grant in fee by legislative authority capacitates the heir of the grantee to inherit though he be an alien."

In Burbank v. Ellis, 7 Neb. 156, the court said:

"The municipality does not acquire the legal title to the site. It is held in trust by the mayor, chairman of the board of trustees or judge of the county, for the *use of the occupants* of the town, and those entitled to deeds."

Speaking of such a title, it was said, by way of illustration, in Railroad Co. v. Ingalls, 15 Neb. 123:

"It is a familiar rule that where a contract is made for the sale of land, the vendor becomes in equity and by construction of law a trustee for the vendee of the real estate, and the vendee becomes a trustee of the vendor for the purchase money. *The vendee is the owner of the land*, although the legal title continues in the vendor. Tiffany and Bullard on Trusts and Trustees, 491; Story's Eq. Juris. sections 790, 1212; Seton v. Slade, 7 Ves. 264; Craig v. Leslie, 3 Wheat. 577; Beverley v. Peters, 10 Peters 532; Henson v. Ott, 7 Ind. 512."

In Leckler v. Chapin, 12 Nev. 65, the court said:

"The land department of the government in its rulings declares that the only beneficiaries of the trust, under the townsite law, are *the occupants of the town*. (I Lester Land Laws 435.) The several courts wherein this question has been presented have uniformly announced the same doctrine. (Leech v. Rauch, 3 Minn. 451; Carson v. Smith, 12 Minn. 560; Winfield Town Co. v. Maris, 11 Kan. 148; Sherry v. Sampson, 11 Kan. 615.) These decisions were nearly all rendered under the act of congress, approved May 23rd, 1844 (5 U. S. S. 657.) But the provisions of the act of 1867, in so far as this question is concerned, are identical with the provisions of the act of 1844."

Attorney General Black (1 Lester's L. L. 431) thus discussed the question:

> "It is very clear that when the mayor, in the execution of his official duty, entered the land on which the city stands, acknowledging all proper obligations and trusts which he could and should have assumed for the benefit of the occupants, *their title (that of the inhabitants) became perfectly good, and that it must be enforced in any court of law or equity.* The object of the law is to give the owners of the lots a good title to their property. When the patent issues under this entry they will have a good title."

It affirmatively appears from the record (Fols. 14 and 19) that defendant in error was in possession of at least a portion of the premises in 1876, and it does not appear (whatever the judgment in the Dakota suit of 1877 may have been) that he was ever actually dispossessed until some time in the year 1883, which would be "eight years prior to the commencement of the action." (Fol. 7, as corrected.) There is no affirmative finding that he was not continuously in possession from 1872 until 1885, but even *if it sufficiently appeared from the record* that the railroad company had unlawfully taken possession of the premises after the original occupancy and held such possession at the date of the townsite entry, that fact would not have deprived the original occupant of the right to his deed, even assuming that such deed were collaterally assailable.

This was held in the case of Pratt v. Young, 1 Utah 347, where the court says:

> "A claimant who was in the bona fide occupancy of a city lot prior to the entry thereof by the mayor, and was wrongfully ousted by an intruder before such entry was made by the mayor, should receive the legal title thereto, notwithstanding the wrongful occupancy of the other at the time of the entry."

To the same effect is the ruling of the Department in Amick v. Carroll (24 L. D. 558), as follows:

> "Where it is shown that a first *bona fide* occupant

> of a town lot, has, through the wrongful or tortious acts of another, lost possession of, or has been ousted from, his rightful occupancy of the lot, which by unjustifiable and illegal means has been reduced to the occupancy and possession of the trespasser, the wrongdoer will not be permitted to profit by his unlawful acts. Although the trespasser may be the sole occupant of the lot at the date of the townsite entry, he will not be permitted to receive his deed therefor; he cannot be held as a *bona fide* occupant. Having been wrongfully dispossessed of the lot and thereafter unable to obtain possession thereof, Amick's occupancy will be considered as unbroken from the date of his first entry thereon."

Counsel speaks of a "*purchase*" by Smith, but there is no evidence of a purchase except from the government, at the minimum price of $1.25 per acre: the consideration, ($5.) for a tract 200x150 ft.,—about three-quarters of an acre—including expenses, negatives the idea of a "*purchase*" from the corporate authorities.

In Berry v. Ginaca, 5 Fed. R. 475, the subject was fully considered by the court, which said:

> "Should the trustee himself advance the purchase money for the inhabitants, he takes the legal title still upon precisely the same trust as if it had come from some other source, and it seems clear that he can not in this way change his relations to the property. He is still nothing but a trustee, and not the beneficial owner. Any attempt on his part to deal with the land as owner, independently, or in disregard of his trust, would be a breach of duty. He can not, by advancing the purchase money, put himself in the position of vendor as between him and his *cestuis que trust*. The 'due proportion' of the purchase money which is or should be paid to him before making a deed *is not purchase money, as between a vendor and purchaser, for which a lien arises when unpaid. It is a sum made payable by the statute, in order that the occupant may not evade his just pro-*

portion of the expenses incident to the purchase of the townsite."

Assuming, now, that the filing of the map of definite location and the grading of that line exhausted the right of way expressly granted, the position of the parties the day thereafter was as follows: The legal title was in the government; the townsite occupants had a possessory right to the respective tracts occupied by them, good as against every one except the government.

They were not trespassers but occupied the public domain by invitation of the government. They have always been considered a meritorious class, and laws are construed in their favor. "Legislation respecting public land is to be construed favorably to the actual settler." Lake Sup. Canal Co. v. Cunningham, 155 U. S. 354.

The railroad company, having exhausted its original and paramount right of selection, still had authority, when deviation from the line of definite location was deemed advisable, to obtain lands needed for railroad purposes by purchase or condemnation, a situation precisely foreseen and provided for in its charter.

Such right, however, could be exercised only according to law, as specifically provided both in its charter and by the general law of the territory. The existence of the *right* did not confer the easement nor define its extent. Such extent is no longer 400 feet in width, but is defined by the charter (sec. 7), thus: "Any lands or premises that may be *necessary and proper* for the construction and working of said road, not exceeding 200 feet on each side of the line of its railroad." Where is the finding in this case that any part of this city block

is "necessary and proper for the construction and working of said road"?

The court will not, by a strained construction of its charter or of the findings of fact, indulge in presumptions in favor of plaintiff in error. The uniform doctrine of the court is to the contrary. In addition to what is said on this point in our former brief, we call attention to the following from the opinion in the case of Fertilizing Co. v. Hyde Park, 97 U. S. 659:

> "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakeable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public wellfare. It is axiomatic in the jurisprudence of this court."

Even if it were conceded that the railroad company, having exhausted its express grant of right of way, might thereafter change its line to any portion of the public lands, so long as the government did not object, such right of new location could certainly not be exercised on more favorable terms than are afforded to a company locating for the first time its line under the general railroad law of March 3, 1875, a former construction of which, by this court, counsel invokes in support of his contention. That is to say, that while the Northern Pacific Charter authorized one definite location paramount to all claims or rights to lands which were public at the date of its passage, all subsequent locations could only be made subject to rights and claims existing when the new location was fixed; and the general law of 1875 authorized all locations to be made upon the same conditions. Construing the Act of 1875, which, like this, was a grant *in praesenti*, this court said in Wash. & Id. R. Co. v. Osborne, 160 U. S. 103:

"It would not be easy to suppose that congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.

"Accordingly, when we examine the act of March 3rd, 1875 (18 Stat. 482) upon which the plaintiff rests its claim of right to appropriate to their use, without compensation, the lands and improvements of Osborn, we find, in the third section, an express provision saving the rights of settlers in possession. That section is in the following terms: 'That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned, and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1st, 1862,' approved again July 2nd, 1864.'

"The legislature of the territory of Idaho. in pursuance of said third section, did provide a law for the condemnation by railroad companies of the right of way over possessory claims (Rev. St. Idaho, tit. 7, p. 576), and undoubtedly the defendant's claim was a possessory one, within the meaning of the legislation of congress. Indeed, as we have seen, the plaintiff company recognized the applicability of this section, and instituted proceedings of condemnation under the Idaho act before it occurred to it to ask the aid of a court of equity in taking possession of the defendan't lands, and improvements, wthout compensaton."

We invite attention to the substantially similar provisions in the Northern Pacific Charter and the act of Dakota, quoted (*ante* p. 3).

But even if this had been an action to recover the value of the property and damages for its use (assuming that it had been taken and used for railroad purposes) we submit that the plain-

tiff could have recovered under the authority of Ry. Co. v. Zeigler, 167 U. S. 65, where the court say:

> "While it is true that at the time when the company took possession of the plaintiff's land the latter had not yet received his patent, but had only made the final proofs, and filed the same in the land office of the United States, and had tendered the purchase price thereof, and had demanded from the register and receiver of said land office a final receipt evidencing his entry of and payment for said land, yet it further appears that before the plaintiff brought this suit his purchase money had been accepted, and a patent from the United States for the said tract of land had been duly executed and delivered to him. The plaintiff, then, having been in possession of the land in question, and having done and performed all that the law required to give him the right to a patent, before the railroad company seized the land, *we think the grant of the patent subsequent to such seizure, but before the bringing of the suit, operated to confer upon the plaintiff the right to demand and recover damages as the owner of the fee.* The railroad company, having taken possession without the consent of the owner, and not having instituted proceedings to condemn, was a trespasser, and liable to indemnify the plaintiff in respect to his possession and title, as they were shown to exist at the time the suit was brought."

Counsel several times refers to the action of the railroad company in "staking out a line" across the eighty-acre tract in the year 1872, and implies, if we understand him, that this was an act of "occupancy" within the meaning of the townsite act. There are at least three conclusive answers to this:

In the *first* place, "staking out a line" within 200 feet of a lot is not "occupancy" of such lot within the meaning of the townsite act. In the *second* place, the occupancy must be for "*town*" purposes; not railroad purposes. In the *third* place, whatever rights might have otherwise been claimed to arise therefrom, the grading and filing a map of a line of definite location more than two miles away operated as an abandonment of the "staked" line and a loss of all rights thereunder.

Counsel says "no doubt the location by the Railroad Company brought the population."

The townsite was located in the year 1872 and more than thirty buildings were erected thereon in that year. The railroad was not built there till June, 1873. It is difficult to see how a railroad built in 1873 could have attracted population in 1872, or how a railroad graded in 1872 through section 17 could have attracted population to a townsite on section 4, two miles away.

Counsel also says "the Railroad Company had therefore been in open, notorious and constant possession of this property, as part of its right of way, yards and depot grounds, for over six years at the least before the plaintiff obtained the deed upon which this ejectment is founded." There is not a word in the record to support this statement, except the allegation in the answer, which counsel, throughout both of his briefs, seems to consider paramount in effect to the findings.

There is not even an inference in the findings that there has been any occupancy for railroad purposes by anyone, except as to the rear twenty-five feet of the premises, and that portion may well have been occupied by others transacting warehouse business with the railroad company.

VII.

The doctrine of Roberts v. Railroad Co. does not apply and ejectment may be maintained.

It necesarily follows that, as there is no finding that these premises were ever occupied for railroad purposes nor that they are "necessary and proper for the construction and working of the road," none of the doctrines announced or authorities cited in Roberts v. N. P. R. R. Co., 158 U. S. 1, are in point; for, as there stated "The foregoing observations apply only to those

portions of the lands in question *which have been actually occupied and used by the railroad company for corporate purposes.*" They certainly cannot apply to lands occupied by "tenants." This company was not chartered as a *landlord.*

It likewise follows that the railroad company cannot resist ejectment as to such lands, if indeed it could as to its roadbed.

It is stated in Elliot on Railroads, vol. 3, sec. 1055:

> "The adjudged cases declare that a company that enters without right, may be ousted by an action of ejectment."

In Western Pa. R. R. Co. v. Johnston, 59 Pa. St. 290, the court said:

> "The plainitff who has never parted with his rights stands on the higher fundamental right of property; that it shall be taken and used by no one for the public purpose of a railroad without just compensation being made to him. This is a sacred constitutional right not to be spirited away by refinement."

In Justice v. Railroad Co., 87 Pa. St. 28, the court said:

> "The facts exhibit no outrage in the taking of the property, but the entry was clearly a trespass. No bond having been filed and approved according to law, the entry was irregular and subjected the company to an action of ejectment. * * * For the latter the owner has his appropriate remedies; his action of ejectment to recover and retain his land, and its use until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been caused by these illegal acts."

In Rusch v. R. R. Co., 54 Wis. 136, it was said:

> "No specific claim is made in the answer that the plaintiff ever consented to the use of his land by the defendant, and the undisputed testimony is that he did not, unless such consent is to be implied from his failure to

order the company off his land, or from his delay in bringing this action. We think no consent can properly be presumed from such failure or delay. Speaking no word and doing no act from which consent can reasonably be inferred, he might proceed to recover his damages or land at his leisure, within the limitations of the statute."

In the case of Daniels v. R. R. Co., 35 Iowa 129, the distinction between this case and those cited by the court in Roberts v. N. P. R. Co., is thus stated:

"There is to our minds a well-defined and reasonable distinction between an action which has for its object the recovery of damages for property taken and which, when recovered, *establishes in the defendant a right to continue possession;* and one which *denies the right of possession and seeks to recover.* Upon principle it would seem that the right to maintain an action of ejectment must exist if the defendant's possession is wrongful. Upon page 335 of Redfield on the Law of Railways it is said: 'If the railway company have assumed to appropriate the land, in violation of the provisions of the statute to be complied with on their part, their acts are ordinarily to be regarded as trespasses.' See cases cited in note 2. And on page 364 it is said: 'It has been considered that if the company enter upon lands without complying with the requisites of the statute, they are liable in trespass or ejectment.' "

In Jones v. Railway Co., 70 Ala. 227, the court said:

"The railroad company in this case having entered on the lands without the consent of the owner, without condemnation by statutory proceedings, and without payment of compensation, was a trespasser, and the owner might have maintained trespass or ejectment against it, or enjoined by bill in equity the construction of its road until compensation to him was ascertained and paid."

VIII.

The charter contemplated the filing of a map of the line of definite location and limited the grant of right of way thereto.

We contend that congress contemplated that this map should be what the words import and that it made provision for surveys to enable it to be such. In this respect it differs from the general law of 1875, which made no such provision.

And this was for a very good reason. The Pacific Railroads,were chartered and endowed with munificent grants upon the theory that there was such a government necessity for their speedy construction as would justify hastening the public surveys along their routes. These routes were specified *generally* in the charters. It was further provided that maps of general routes were first to be filed, *whereupon* the odd sections within the granted limits were to be *withdrawn*. This, certainly, contemplated a survey upon which such withdrawals could be based. *Afterwards* a map of definite location was to be made, presumably (as the circuit court of appeals well said) *after careful and exact surveys*. As the map of definite location had only the two purposes of fixing the right of way and the lateral limits of the land to be patented to the company, there was *no necessity* for filing it until just before construction began; because its earlier filing would not facilitate either of the purposes for which it was to be filed.

The company was, therefore, not *required* to file its map of definite location in advance of the public surveys and it does not appear that it did so. On the contrary, those surveys were made in 1872. The plat of the surveys was filed in March, 1873, and the map of definite location in May, 1873.

That is the construction which has been given to this very charter by the Department, 21 L. D. 412, where it is said:

> "Section 3 of the act requires that the line of road be definitely fixed by filing a plat thereof in the office of the commissioner of the general land office, and authorizes the selection of indemnity for lands then ascertained to be lost to the grant, for stated causes. * * *
>
> "Section 6 of the act contemplates that, prior to definite location, 'the general route shall be fixed,' by filing a map of the same; *whereupon* the odd sections, within the granted limits, on each side of the line, were to be excluded from sale, entry or pre-emption *until the definite location is made.*"

Counsel says, upon page 14 of his brief, "Not a map was ever filed, or ever requested by the department, on a scale large enough and with sufficient detail of reference so it *could* fix the right of way," and yet, upon page 17, referring to the map filed in that department with the report of the commissioners, he says:

"Attached to this report was an *accurate map, showing the exact location of the constructed road.*"

That report is "Exhibit 2," which, by stipulation (Record, Fol. 53) it was agreed might be used on this argument. We invite the court's careful scrutiny of the map, from which it will appear that it scarcely more accurately locates the line than did the map of definite location. The fact is that, like every map of any considerable size that was ever made from any survey, reference to field notes is necessary to determine with exactness the limits, unless the courses and distances are given on the map. As we have shown in our former brief, these courses and distances are fully available (Record, Fol. 38).

That this has been the understanding of the Department is evident from the following extract from the decision of the Secretary in Collett v. Ry. Co., 24 L. D. 181:

> "The maps, text books, and official plats of survey on file in your office must be the guide—there can be no other or better guide—as to the location of railroad lines,

and the distances therefrom of lands in conflict between railroad companies and settlers."

In 18 L. D. 510, the Secretary says:

> "The department has never approved maps of constructed road except in instances where maps of definite location had not theretofore been approved, and the maps of constructed road were held, for the purpose of approval, to be maps of definite location as well."

Considering a map of definite location of a canal, filed under a similar provision, the Secretary said, 15 L. D. 476:

> "The department not only has the right, but it is its duty to see that the lines are so fixed and determined that the patentee may know what he is receiving of the government when he takes its patent for the land over which this canal is constructed. I therefore return this map without my approval."

And, in 14 L. D. 118, as follows:

> "The law does not authorize the construction of railroad companies on the public lands beyond the line of the *right of way secured by the approval of a map of definite location.*"

In Noble v. Union R. L. Ry. Co., 147 U. S. 165, the court had under consideration a case where a railroad company, availing itself of the provisions of the general law of 1875, had filed a map of definite location which had been approved by the Secretary of the Interior. His successor in office attempted to annul the grant. The court said:

> "The lands over which the right of way was granted were public lands, subject to the operation of the statute; and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the secretary of the interior to decide, and, when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company."

It is not necessary to hold that, even where such right has

vested, it may not be lost by abandonment, and, in such case, there is no reason why a re-location may not be allowed where the government does not object, provided no other rights would be injuriously affected thereby. This idea was thus expressed in 21 L. D. 250, where, referring to the act of 1875, the Secretary says:

> "The filing of the map of location within the time prescribed by the act fixes the right of the road as to all lands which shall be traversed by it, and after the road is so located, all lands upon the line thereof, * * *
>
> "But I can see no reason why the company should be denied the right to file a new map of location at any time thereafter, even after the expiration of the five years, *to operate upon only such portions of the public lands as are free from every claim of right at the date of the approval of the new map of location.*"

On the other hand, the theory of the general law of 1875 was entirely different. It was not known when or where the roads which might avail themselves of its provisions would be built. There could be no grant *in praesenti* to them, in the same sense, because those that were to come into existence thereafter, would come under its terms as well as those existing when the act of 1875 was passed. Consequently a map of definite location filed under that act before construction might well be held to operate only to preserve the right of way until construction and to be unnecessary where the road had already been constructed; because, by such construction, the purpose of the grant had been attained. But as *construction*, under the act of 1875, took the place of the *map of definite location* under the land-grant acts, the same exception in favor of "possessory rights" existing at date of construction, which this court has recognized under the act of 1875, should be recognized at date of filing of map of definite location under the charter, as to all lands not covered thereby, when construction is changed to such lands.

The cases of Dak. C. R. Co. v. Downey, 8 L. D. 115, and R. R. Co. v. Maloney, 24 L. D. 460, cited by counsel for plaintiff in error, hold no more than that, under the act of 1875, a railroad company which has actually selected and used for station purposes "prior to any settlement by a homesteader, unsurveyed lands afterwards embraced in his entry, has a paramount right thereto, even though its plat be filed thereafter. This does not militate against our contention, in the least.

And we contend that such has been the construction of the Department.

Perhaps the Department has never more closely ruled upon the question at bar than in the matter reported in 1 L. D. 412, which arose upon the application of this same railroad company for indemnity lands by reason of loss of lands east of Thomson, Minnesota, that being its eastern terminus, as shown by its map of definite location, whereas its line extended as far east as Ashland, Wis. The Secretary says:

> "The absolute and unquestioned right to select and determine finally the initial point or terminus, as here contended for, can not be conceded. The law never intended to vest such absolute power in the railroad company. It requires in all cases that the line of location must be approved by the land department. A company may file a dozen maps, but no rights will accrue thereby to it without the approval of this department. Van Wyck v. Knevals, 106 U. S. 360, 366. * * *
>
> "*And these requirements as to the filing and approval of maps relate to all parts of the proposed route from beginning to end*, including the termini. * * *
>
> "It is a well settled rule of law that the powers of a legislative corporation are such only as are conferred by statute; the charter is the measure of power, and the enumeration of those powers is the exclusion of others. (Thomas v. N. P. R. R. Co., 101 U. S. 71, 82.) It is likewise well settled that where authority is given to do an act, *that power is exhausted when once exercised*, unless it clearly appears that it was intended the exercise

thereof was to be continuous. (East Tenn. etc. Ry. v. Frasier, 139 U. S. 288.) It will not be contended in the present instance that authority was given to the Northern Pacific Railroad Company to establish more than one point or terminus on Lake Superior, or to continue to establish points or termini at different places, from time to time as might meet the views of its changing officers, and the rule seems to be wthout exception that, where authority to locate a railroad is given to a company, when that location is made, the power is exhausted, and the company *can not thereafter change that location at will.* (Pierce on Railroads, 254, 255; Delaware Canal Co. v. Erie R. R. Co., 9 Paige 328; State v. Norwalk, etc. Co., 10 Conn. Rep; Mason v. Brooklynd R. R. Co., 35 Barb. 374; People v. N. Y. & Hudson R. R. Co., 45 Barb. 73; Van Wyck v. Knevals, 106, U. S. 366)."

Another decision of the Department which, it seems to us, should have great influence here, was that in Florida Central and Peninsular R. R. Co., v. Bell et al., 22 L. D. 452, where the Secretary says:

"There can be little doubt as a general proposition that a railroad may deviate in construction from its line of definite location, rendered necessary to avoid engineering obstacles or remedy defects in the original location, not destroying the identity of the road constructed with the one located and confined within the limits of the grant, and that the right of the company to the lands conferred by the grant will not be defeated thereby. It was so held by the Supreme Court in the case of Van Wyck v. Knevals (106 U. S. 360), and by the decision of Secretary Lamar in the Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 6 L. D. 209, in which the law and decisions affecting this question are reviewed at length.

"But unless it be concluded that the lateral lines of the company's grant are extended across the reservation in question, *then an analogous application of this rule to a right of way only, would confine the company to the limits of its line of definite location*, the width of which, in the absence of statutory designation, would be confined to such territory as the necessities of the

road require, and any further deflection would *be an abandonment of its definite location, and therefore of its right of way* * * *

"There does not appear to be any good reason for extending these lateral lines. It would serve no other purpose than to secure to the company the right to change its line of constructed road a distance of some 6 miles on either side of its definite location, and thus practically reserve from disposition a tract of land 12 miles wide, until the company has actually constructed its line, or render uncertain the title of every man who makes entry of any of said lands. I do not believe that congress so intended. A right of way was granted over this reservation on any line the company might select. Until this selection was made it was the duty of the government to take no steps that would interfere with the free exercise of this right. The selection was made in this case by filing a map of definite location. The right granted had then been exercised and exhausted, so far as the rights of others are concerned.

"I do not so understand the Baldwin case. At the date of the grant to the plaintiff company in that case the land in controversy was vacant and unoccupied land of the United States.

"Baldwin acquired whatever rights he possessed two years prior to definite location. The company contended that Baldwin took the land subject to the right of way; Baldwin contended that the grant of the right of way took effect only from the date at which the company filed its map designating the route with the Secretary of the Interior. * * *

"It is evident that the court had under consideration a very different case than the one here presented. *There was no deflection of line from definite location.* The road was actually constructed on the line selected by the company and approved by the department. The case does not hold anything except that such a grant 'is absolute and *in praesenti*, and a party subsequently

acquiring a parcel of such lands takes it subject' to the right of way.

"The case at bar is different in two important particulars. The homestead and pre-emption claimants herein do not seek to acquire title to lands over which a railroad company has selected its right of way by map of definite location, nor did the company build on its line of definite location. That the grants of right of way and of lands in aid of the construction of plaintiff company's road were grants *in praesenti;* that these grants were afloat until the line of the road was definitely fixed, and that then the selection of the lands and of the right of way was made thereby, and the right to lands and easements thus selected vested in the company as of the date of the grant, are propositions well settled. See Railroad Company v. Dunmeyer, 113 U. S.; St. P. & P. R. R. Co., 139 U. S., and cases cited. But these principles do not sustain the contention of the plaintiff company herein. The grant of right of way to the Florida Central & Peninsular R. R. across the Fort Brooke Reservation was a grant *in praesenti* and *attached on definite location after the date of the grant, but it did not attach to the whole reservation.* The map of definite location was a designation of the land selected for the purposes of the right of way, and the company's right attached to these lands as of the date of the grant, and by this act all other lands within the reservation were released from the company's claim. If the government were the only party in interest the same cogent reasons would not exist for invoking a strict interpretation of the law, inasmuch as it would make no difference to the government at what point the railroad crossed the reservation, but I am of the opinion that the company has no legal right to materially deflect its road from its line of definite location, and where adverse rights have attached to lands affected thereby, the land department will not embarrass the remedy of the legal title holders of such lands against the company in the courts, by making reservations of rights of way in the patents to be issued to the owners of the land."

In the case of M. K. & T. Ry. Co. v. Roberts, 152 U. S. 114, cited by counsel, the court had under consideration only the relative rights of the railroad company and one claiming, under a patent from the state of Kansas, a part of section 16, claimed to have been acquired by the state as a "school section." It was located within the limits of what was, at the date of the grant to the company, an Indian reservation, and the court held that the state obtained no title. As to the grant of the right of way through such reservation, the provision was, "the right of way, 200 feet in width, is hereby granted, subject to the approval of the president of the United States." Therefore, having constructed the road upon a line approved by the president, the company had *exactly complied with the conditions of the grant* in respect of right of way through the reservation. There was no provision expressly or impliedly authorizing the acquisition of the right of way through the reservation by the filing of a map of definite location in the general land office and the approval thereof by the secretary of the interior. That matter was committed by congress to the president, as the treaty-making power. Nor was there any question of change of location. It was in view of such a situation that the court, after reciting the terms of the grant, as above stated, and the approval by the president and the construction of the road upon the line thus approved, said, as quoted by counsel, "The right of way for its road, 200 feet in width, was granted to the company unconditionally, *subject only to such approval.* The title to the land for the 200 feet in width thus granted vested in the company, either upon the passage of the act of con-

gress, July 26, 1866, or upon the construction of the road, and, *so far as the present case is concerned, it does not matter which date be taken.*" It is evident that no question involved in this case was there presented or considered.

The case of Bybee v. Or. & Cal. R. Co., 139 U. S. 663, involved no question of map of definite location nor of change of right of way. The same is true as to the case of Flint & P. M. Ry. Co. v. Gordon, 41 Mich. 420.

Moreover this case is expressly disapproved in an able opinion by Justice Mitchell in R. R. Co. v. Sture, 32 Minn. 95.

IX.

The action of the commissioners appointed to examine the constructed road had no effect so far as its title to right of way, is concerned.

Counsel lays great stress upon the so-called "approval" by the President of the report of commissioners appointed to examine the character of the road. In addition to what we have said upon this subject in our former brief, we submit that it was no part of the functions of these commissioners to submit any map; there was no provision for filing or accepting or approving any such map, and neither the recommendation nor the approval referred to the map, and if they did, such action would have been ineffectual.

Counsel has quoted from the decision of Secretary Lamar, *In re* Chicago, St. P., M. & O. R. Co., 6. L. D. 205. We further quote therefrom as follows:

> "When the line of a land grant railroad has once been definitely fixed by the filing and acceptance of its map, there is no authority to change that location except the legislative; and in the absence of a legislative sanction the action of the land authorities in allowing or recognizing such change can neither confer nor take away rights."

As to the claim that it is not usual to insert in patents of lands traversed by rights of way an exception thereof, we understand the rule to be that, where the granting act does not provide that public lands liable to be affected thereby shall pass subject thereto, (as is the case in the general law of 1875) and where it does not appear that, at the time such lands are patented, the railroad grant has been forfeited, *it is necessary* that such exception should be made in the patent or it cannot be claimed to exist. In the case of *ex parte* Arnett, 20 L. D. 131, cited by counsel as an authority to the contrary, it was said:

> "In the absence of such statutory protection, and it not appearing that the rights of the company had been forfeited by legislative enactment, or judicial determination, it became the duty of the land department to insert the right of way clause in all patents issued for lands over which such right of way had been granted."

And the same doctrine is re-iterated in Dunlap v. Ry. Co., 23 L. D. 67, likewise cited by counsel on the same point.

X.

The plea for reversal upon grounds of expediency should not prevail.

The burden of the third division of counsel's brief seems to be that, without regard to logical construction, established rules of law and the settled doctrine of this court, this case should be reversed for the convenience of this and other land-grant railroad companies.

While we are aware that questions of expediency have sometimes influenced the decisions of courts of law, we respectfully suggest that the exigencies of the situation do not warrant such an appeal to this august tribunal. As we have

endeavored to point out in our former brief, there are many reasons why the established rules of law should prevail in this case. As already stated, we do not seek to disturb the possession of one foot of ground that is or ever was occupied for track, road-bed, yard or depot-grounds. The judgment can be affirmed without affecting the rights of this or any other company in either of these respects. Moreover, we repeat, that nearly twenty-five years have elapsed since this road was constructed to the Missouri River and fifteen years since it was completed to the Pacific Ocean. The statutes of limitation (prescription) of all the states west of Dakota bar all adverse claims in ten years or less.

We respectfully submit that adherence by this court to the doctrine announced in M. K. & T. Ry. Co. v. Cook, as the only logical culmination of repeated decisions to the same general effect, will not only preserve its consistency, but will tend to that security of titles and certainty of boundaries which it is the object of courts to conserve.

Respectfully submitted,

H. F. STEVENS,

Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 93.

THE NORTHERN PACIFIC RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

PATRICK R. SMITH, DEFENDANT IN ERROR.

Documents Relating to Original Reply and Error in Transcription Thereof.

H. F. STEVENS,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-19-'98

IN THE

Supreme Court of the United States.

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THE NORTHERN PACIFIC RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

PATRICK R. SMITH, DEFENDANT IN ERROR.

Documents Relating to Original Reply and Error in Transcription Thereof.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

PATRICK R. SMITH, *Plaintiff*,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, *Defendant*.

Reply.

Said plaintiff, for reply to the amended answer of said defendant, admits that on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial dis-

trict for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action; but he alleges and avers that said action in said district court has been duly dismissed without prejudice to the plaintiff or to his right to maintain another action in any court whatsoever, and that there is now no other action pending in any court between the parties to this action involving the issues or cause of action involved in this action or any *or any* part of the same.

He denies that the land mentioned in the complaint has been for more than twenty years, or for any other or greater or lesser period, or for any period whatsoever, in the lawful possession of the defendant as its right of way, road-bed, and depot grounds, or for any other purpose or in any other manner whatsoever; but he admits and avers that the southerly half of said premises has been unlawfully used and possessed by said defendant, partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same, for purposes connected with the shipment and receipt of freight to and from the railroad of said defendant, for a period of eight years last past, and that the northerly half of said premises has been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same, and that such occupation has not been for any of the purposes or uses mentioned in said answer.

He denies that said land or any part thereof has been in the possession of said defendant for twenty years, whether as stated in said answer or otherwise.

He denies that said defendant recovered judgment against the plaintiff on the 31st day of January, 1878, as stated in said answer, or at any other time or in any other manner whatsoever, and he denies that there is any such judgment as therein stated or any judgment against him in favor of said defendant in full force, unreversed, and unsatisfied or otherwise.

Wherefore said plaintiff again demands judgment as prayed for in his complaint, notwithstanding anything in said answer contained.

F. H. REGISTER,
Attorney for Plaintiff, Bismarck, N. D.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Patrick R. Smith, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing *answer* and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated upon his information and belief, and that as to those matters he believes it to be true.

PATRICK R. SMITH.

Subscribed and sworn to before me this 4th day of April, 1892.

[SEAL.] M. P. SKEELS,
Notary Public, Burleigh Co., North Dakota.

UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

IN THE CIRCUIT COURT.

I, J. A. Montgomery, clerk of the circuit court in and for the district of North Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete copy of the original reply in the above-entitled action as the same now remains on file in said office.

Witness my hand and the seal of said court, at Bismarck, in said district, this 22d day of January, 1898.

[SEAL.] J. A. MONTGOMERY, *Clerk,*
By R. D. HOSKINS, *Deputy.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1897.

NORTHERN PACIFIC RAILROAD COMPANY ET AL., *Plaintiffs in Error*,
vs.
PATRICK R. SMITH, *Defendant in Error.*

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

Hiram F. Stevens, being of lawful age, after being duly sworn, deposes and says that the original reply in the above-entitled action, which was filed in the circuit court of the United States for the district of North Dakota on the fifth day of April, A. D. 1892, and which has been transmitted from said court to and for inspection by the Supreme Court of the United States, pursuant to the provisions of the fourth subdivision of rule eight of said last-named court, is in the handwriting of this affiant; that the erasure of the last three letters of the word "eighteen," occurring therein, was made by him before said reply was filed; that no change has ever been made in said reply since it was so filed; that the type-written copy thereof prefixed to this affidavit, exclusive of the clerk's certificate at the end thereof, was made at Bismarck, in the State of North Dakota, by some one whom affiant does not now remember, between the fourth and ninth days of April, A. D. 1892, at affiant's request, and was, on the ninth or tenth day of said April, brought by affiant to his office in St. Paul, in the State of Minnesota, and there remained in his files, undisturbed and unchanged, until about the 20th day of January, A. D. 1898, when it was found by affiant in its present condition among said files; that thereupon affiant transmitted the same to R. D. Hoskins, deputy clerk of said circuit court, with the request that he compare the same with the original and, if found correct, certify and return the same to affiant, which was done;

that in the printed record upon the first writ of error in said action, issued by the circuit court of appeals for the eighth circuit to said circuit court of North Dakota, a copy of which is herewith presented, said word appears as "eight;" that affiant never knew, until his attention was called to the fact by one of the justices of this honorable court upon the former argument, that said word appeared in the printed record in this court as "eighteen;" and further affiant saith not, save that this affidavit is submitted to be considered, if proper, in connection with the inspection of said original reply, pursuant to the provisions of said rule eight.

HIRAM F. STEVENS.

Subscribed and sworn to before me this 18th day of March, A. D. 1898.

[SEAL.] JAMES D. MAHER,
Notary Public.

UNITED STATES OF AMERICA, }
District of North Dakota, } *ss:*

IN CIRCUIT COURT.

I, R. D. Hoskins, deputy clerk of said court, do hereby certify that on the 22d day of January, A. D. 1898, I compared a typewritten copy of the reply in the case of Patrick R. Smith, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant, with the original thereof which was filed in this court on the 5th day of April, A. D. 1892, at the request of H. F. Stevens, which typewritten copy was presented to me, at Bismarck, by P. E. Byrne; that I called the attention of said Byrne at the time to the fact that the words "for a period of eight years last past," as contained in said typewritten copy, appeared upon the original as having been written originally "for a period of eighteen years last past," but that the last three letters of the word "eighteen" had been erased; but we both concluded that as

filed it read "eight" years, and I certified to said typewritten copy for that reason.

That thereafterwards I was called upon by one Alexander Hughes, who is and was the local attorney of the defendant in said action, and was requested by him to make a certificate, which I did, to the effect that the word in question was originally written "eighteen," and that the last three letters had been erased, but when or by whom I could not state.

I hereby certify that I did not intend by my said last certificate to intimate that said erasure had been made improperly, and I now find that in the certified copy of said reply which was furnished at the time of the first writ of error from the United States circuit court of appeals for the eighth circuit, as evidenced by a certified copy of same from the clerk of said court, the word was written "eight;" and I further certify that I have no reason to believe that said reply had been changed since it was originally filed.

I further certify that the accompanying two photographs—the one purporting to show the page of said reply upon which said word occurs, and the other showing a portion of the same, including the word in question, upon an enlarged scale—are photographs from said original made by A. E. Boyce, a photographer, at said Bismarck.

Witness my hand and the seal of said court, at Bismarck, in said district, this 25th day of February, A. D. 1898.

[SEAL.] R. D. HOSKINS,
Deputy Clerk.

(Here follow photographs.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

PATRICK R. SMITH, *Plaintiff*,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, *Defendant.*

Reply.

The plaintiff, for reply to the amended answer of said defendant, admits that on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial district of the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action; but he alleges and avers that said action in said district court has been duly dismissed without prejudice to the plaintiff or to his right to maintain another action in any court whatsoever, and that there is now no other action pending in any court between the parties to this action involving the issues or cause of action involved in this action or any *or any* part of the same.

He denies that the land mentioned in the complaint has been for more than twenty years, or for any other or greater or lesser period, or for any period whatsoever, in the lawful possession of the defendant as its right of way, road-bed, and depot grounds, or for any other purpose, or in any other manner whatsoever; but he admits and avers that the southerly half of said premises has been unlawfully used and possessed by said defendant, partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same, for purposes connected with the shipment and receipt of freight to and from the railroad of said defendant, for a period of eight years last past, and that the northerly half of said premises has been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same, and that such

occupation has not been for any of the purposes or uses mentioned in said answer.

He denies that said land or any part thereof has been in the possession of said defendant for twenty years, whether as stated in said answer or otherwise.

He denies that said defendant recovered judgment against the plaintiff on the 31st day of January, 1878, as stated in said answer, or at any other time or in any other manner whatsoever, and he denies that there is any such judgment as therein stated or any judgment against him in favor of said defendant in full force, unreversed, and unsatisfied or otherwise.

Wherefore said plaintiff again demands judgment as prayed for in his complaint, notwithstanding anything in said answer contained.

F. H. REGISTER,
Attorney for Plaintiff, Bismarck, N. D.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Patrick R. Smith, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing *answer* and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated upon his information and belief, and that as to those matters he believes it to be true.

PATRICK R. SMITH.

Subscribed and sworn to before me this 4th day of April, 1892.

[SEAL.] M. P. SKEELS,
Notary Public, Burleigh Co., North Dakota.

On the back of said reply appear endorsements in words and figures following, to wit:

20. In the circuit court of the United States for the district of North Dakota. Patrick R. Smith, pl't'ff, *vs.* The Northern Pacific Railroad Co., def't. Reply. Due service at Bismarck, N. D., this 4th day of April, A. D. 1892, of the within reply is hereby admitted. Alexander Hughes, att'y for def't. Filed Ap'l 5th, 1892. J. A. Montgomery, clerk. F. H. Register, att'y for pl't'ff.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing pages, numbered from one and two, inclusive, contain a true copy of the reply as contained in the original transcript of record in the case of Patrick R. Smith, plaintiff in error, *vs.* The Northern Pacific Railroad Company, No. 201, May term, 1893, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 22d day of February, A. D. 1898.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

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NORTHERN PACIFIC RAILROAD COMPANY *v.* SMITH.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 93. Argued March 21, 1898. — Decided May 31, 1898.

Neither the city of Bismarck, as owner of the town site, nor its grantee Smith, can, under the circumstances disclosed in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending two hundred feet on each side of its said road.

The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial.

By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants.

The precise character of the business carried on by such tenants is not disclosed, but the court is permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action.

This was an action brought by Patrick R. Smith on the 28th day of December, 1891, in the Circuit Court of the United States for the District of North Dakota against the Northern Pacific Railroad Company. The complaint and answer were as follows:

"The complaint of the above-named plaintiff respectfully

Statement of the Case.

shows to this court and alleges that the plaintiff is and ever since the organization of the State of North Dakota has been a citizen thereof, and that prior thereto he was during all the time hereinafter mentioned a citizen of the Territory of Dakota.

"That during all the time hereinafter mentioned the above-named defendant has been and still is a corporation created by and existing under and in virtue of an act of the Congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, by the Northern route,' approved July 2, 1864.

"That on the 14th day of September, A.D. 1876, the plaintiff became and ever since has been and still is duly seized in fee simple and entitled to the possession of the following described real property situated in the city of Bismarck, in the county of Burleigh and Territory of Dakota, (now, and since the organization thereof under a state government, the State of North Dakota,) to wit: Lots numbered five, six, seven, eight, nine, ten, eleven and twelve, in block number eight, according to the recorded plat of the city of Bismarck, D. T., together with the hereditaments, privileges and appurtenances thereof and thereto belonging.

"That said defendant more than six years prior to the commencement of this action wrongfully and unlawfully went into possession of the premises above described. That said defendant ever since said entry has wrongfully and unlawfully retained and withheld, and still does wrongfully and unlawfully retain and withhold, the possession thereof from the plaintiff. And that the use and occupation thereof during said time was worth at least five thousand dollars a year. That the damage to the plaintiff by the wrongful withholding of the possession of the premises as aforesaid is the sum of thirty thousand dollars.

"Wherefore the plaintiff demands judgment against said defendant for the possession of said premises and for the sum of thirty thousand dollars, his damages as aforesaid, together with his costs and disbursements herein."

"The defendant for amended answer to the complaint herein:

"First. For a first defence, alleges —

"That the land mentioned in the complaint is situated within two hundred feet of the centre line of the roadbed of its line of railroad constructed through the State of North Dakota, and has been for more than twenty years in its lawful possession as its right of way, roadbed and depot grounds, and that the same was granted to it as a right of way by the act of Congress described in the complaint.

"Admits that at all times mentioned in the complaint the plaintiff was a resident of the city of Bismarck, in the State of North Dakota, and further admits that the defendant is a corporation created by the said act of Congress. Denies each and every allegation in the complaint not hereinbefore specifically admitted, and it specifically denies that by reason of any of the allegations or things in the said complaint set forth the plaintiff has been damaged in any sum whatever.

"Second. For a second defence —

"That on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial district for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action.

"That at the time of the commencement of this action, said action was pending in said court and is still pending therein.

"Third. For a third defence —

"That on the 31st day of January, 1878, the defendant recovered judgment against the plaintiff for the possession of a portion of the property described in the complaint, to wit, that portion thereof described as lots eleven and twelve, for six cents damages and for $ —— costs, and that said judgment was rendered upon the cause of action mentioned in the complaint, which judgment is in full force, unreversed and unsatisfied.

"Wherefore, the defendant demands judgment: 1st. That the complaint be dismissed. 2d. For its costs and disbursements in this action."

Statement of the Case.

The findings of fact and law made by the trial court were as follows:

"The property in controversy, the same being eight lots in the city of Bismarck in North Dakota, described as lots five (5) to twelve (12) both inclusive, in block eight (8), in the city of Bismarck, which was formerly known as Edwinton, and the name of which was changed by act of the legislature of the Territory of North Dakota to 'Bismarck,' was part of an eighty (80) acre tract of land which was entered by John A. McLean as mayor of the city of Bismarck, in behalf of its inhabitants, under the town site act, (Revised Statutes, sec. 2387,) and was patented to him thereunder July 21, 1879.

"The corporate authorities of that city subsequently and more than six years prior to the commencement of the action conveyed these lots to Patrick R. Smith, the plaintiff.

"The eighty (80) acre tract, on which these lots were situated, was selected as the location of a portion of this town site, and surveyed prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior and Puget Sound Land Company — the company that first made this selection — commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

"The Congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

"On February 21, 1872, the Northern Pacific Railroad

Company filed in the Department of the Interior the map of its general route east of the Missouri River. This route passed about three quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line. The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872 there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873 the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant, through its tenants, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

"In the year 1877, the defendant commenced an action in the district court of Burleigh County, Territory of Dakota, (now the State of North Dakota,) in which county the premises next hereinafter described were and are situated against certain parties including the plaintiff herein, to recover the possession of part of the premises here in question, which portion is particularly described as follows: Commencing at

the southeast corner of Main and Third streets in the city of Bismarck, the same being the northwest corner of block eight (8), running thence east along the south line of said Main street, a distance of fifty (50) feet; thence south, parallel with the east line of said Third street, a distance of seventy-five (75) feet to said east line of said Main street, a distance of fifty (50) feet, to said Third street; thence north, along said east line of said Third street, a distance of seventy-five (75) feet to the place of beginning. And such proceedings were duly had in said action in said court (the same being a court of competent jurisdiction of the parties and subject-matter of said action) that the defendant in the action herein (the plaintiff in the action last above referred to) duly recovered in said action a judgment against the defendants in that action including the plaintiff in this action, for the possession of the premises last above described and for nominal damages for the withholding thereof.

"That the value of the use and occupation of the premises in question, for six years prior to December 28, 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars.

"From the foregoing facts I find, as conclusions of law, that the plaintiff is entitled to the possession of the premises above described, and to recover from the defendant the sum of twenty-six thousand dollars with interest thereon from the 28th day of December, A.D. 1891, at the rate of seven per cent per annum, and his costs and disbursements."

Mr. C. W. Bunn, for plaintiffs in error. *Mr. C. W. Halcomb*, by leave of court, filed a brief for same.

Mr. H. F. Stevens for defendant in error.

Mr. Justice Shiras, after stating the facts, delivered the opinion of the court.

By the second section of the act of July 2, 1864, creating the Northern Pacific Railroad Company, there was granted

to that company, its successors and assigns, the right of way through the public lands to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain.

During the year 1872, there was a line staked out across the tract, a portion of which is in dispute in this case, substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the latter year the railroad was constructed across this tract, and has since remained and been operated upon it. The lots in question are within two hundred feet of the main track of this railroad as actually constructed, and have been occupied by the defendant during the entire period since the construction of the road, excepting lots eleven and twelve, which during about three years were in the adverse possession of the firm of Browing & Wringrose and of Patrick R. Smith, the defendant in error, as the tenant of said firm.

In 1877 an action of ejectment, to recover possession of said lots eleven and twelve, was brought by the Northern Pacific Railroad Company, in the district court of the Territory of Dakota against Browing & Wringrose and said Patrick R. Smith, which action resulted, on January 31, 1878, in a final judgment, still subsisting, against said Smith and the other defendants.

On the trial of the present action, which was brought in the Circuit Court of the United States for the District of North Dakota in 1893, and which brought into question the title and possession of lots five, six, seven, eight, nine and ten, as well as of lots eleven and twelve, the plaintiff, Patrick R. Smith, set up, as the basis of his title and right of possession, a deed of conveyance by the corporate authorities of the city of Bismarck of the said lots as part of a town site plat patented to John A. McLean, as mayor of said city, on July 21, 1879. The record does not disclose a copy of such deed to Smith, nor its date. In his complaint Smith alleged that "on the fourteenth day of September, A.D. 1876, he became and ever since has been and still is duly seized in fee simple and entitled to the possession" of the property in dispute.

In the findings it is stated that the city authorities conveyed these lots to Patrick R. Smith, the plaintiff, *subsequently* to the granting of the patent to the mayor on July 21, 1879.

The defendant, the Northern Pacific Railroad Company, at the trial relied on its grant of a right of way from the United States on July 2, 1864, on its possession of lots six, seven, eight, nine and ten since the construction of the railroad in 1873, and of lots eleven and twelve since their recovery under the action and judgment in 1878, and the company likewise put in evidence the record of said suit and recovery as constituting *res judicata.*

The learned judge of the Circuit Court, after stating the foregoing facts, and some others not necessary to be here mentioned, entered judgment that the plaintiff was entitled to recover the possession of all of said lots and the sum of twenty-six thousand dollars, as the value of the use and occupation of the premises in question, for six years prior to December 28, 1891, the date of the commencement of the action; and that judgment was affirmed by the Circuit Court of Appeals. 32 U. S. App. 573.

When it was made to appear that, by the second section of the act of July 2, 1864, there was granted to the Northern Pacific Railroad Company a right of way through the public lands, to the extent of two hundred feet in width on each side of said railroad; that, in pursuance of said grant, the railroad company had constructed its road in 1873, including in its right of way the land in dispute; that, on November 24, 1873, commissioners, appointed under the fourth section of said act, reported that they had examined the Dakota division of said railroad, (including that portion of the same which covered the land in controversy,) and that they had found its construction and equipment throughout to be in accordance with the instructions furnished for their guidance by the Interior Department, and accordingly recommended the acceptance of the road by the Government; that said report had been, on December 1, 1873, approved by the President; and that the company had maintained and operated said railroad since its said construction to the time of trial, undoubtedly

there was thus disclosed a *prima facie* title and right of possession of the disputed tract.

To overthrow the railroad company's case the plaintiff depended on an alleged conveyance made to him after July 21, 1879, by the city authorities of the city of Bismarck, of the lots in dispute in this suit, and gave evidence that the eighty-acre tract on which these lots were situated was selected as a portion of a town site and surveyed prior to June 20, 1872, by the Lake Superior and Puget Sound Land Company, and that said land company made and, on February 9, 1874, recorded, a plat thereof, and that said town site and plat was afterwards adopted as the town site of the city of Bismarck under the town site act of the United States, (sec. 2387, Rev. Stat.,) and was patented as such town site to John A. McLean, mayor of said city, on July 21, 1879. The Congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof was filed in the General Land Office in March, 1873.

It is evident that, when in 1873, the Northern Pacific Railroad Company took possession of the land in dispute, as and for its right of way, and constructed its road over and upon the same, if the tract so taken was then part of the public lands, only the United States could complain of the act of the company in changing the location of its tracks from that previously selected. But, so far as this record discloses, the United States did not object to such change of location, but rather, by having, through the commissioners and the President, approved and accepted this part of the road when constructed, must be deemed to have acquiesced in the change of location as properly made.

But was the land in question part of the public domain in the spring of 1873? It certainly was, unless the occupation, at that time, of those who afterwards, in 1879, obtained a patent for a tract of eighty acres, including the land in question as part thereof, for a town site, deprived it of that character.

It has frequently been decided by this court that mere occupation and improvement on the public lands, with a

view to preëmption, do not confer a vested right in the land so occupied; that the power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts, in cases where the land has ceased to be Government property by reason of a right vested in some person or corporation; that such a vested right, under the preëmption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser. *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232; *Northern Pacific Railroad* v. *Colburn*, 164 U. S. 383.

If, then, one seeking to appropriate to himself a portion of the public lands cannot, no matter how long his occupation or how large his improvements, maintain a right of possession against the United States or their grantees, unless he has, by entry and payment of purchase money, created in himself a vested right, is one who claims under a town site grant in any better position?

No cases are cited to that effect; nor does there seem to be any reason, in the nature of things, why rights created under a town site settlement should be carried back, by operation of law, so as to defeat the title of a party who had, under color of right, taken possession and made valuable improvements before the entry under the town site act.

It is one of the findings of fact that, in the year 1872, the Lake Superior and Puget Sound Land Company occupied a tract of land, including within its boundaries the land in dispute, but it is also found that no plat thereof was filed in the register's office until February 9, 1874, a year after the railroad company had gone into possession and constructed its road, and that the patent was not granted to the mayor in behalf of the city of Bismarck till July 21, 1879. It is also one of the findings that the corporate authorities did not convey these lots to Patrick R. Smith till *after* the grant of the patent.

The record contains no copy of the deed to Smith, nor statement of any consideration paid by him, nor of the date when, if ever, he went into actual possession.

In such a state of facts will the law overturn the title of the railroad company by imputing to Smith the antecedent possession of the Lake Superior and Puget Sound Land Company? Whatever may be his rights to the land outside of that in possession of the railroad company, must it not be inferred that he bought subject to the public highway? It is found that in the month of June, 1873, the railroad had been constructed across this tract, and has since remained and been operated upon it; and it is hard to imagine what notice more distinct and actual could be given than that afforded by the operation of a railroad. Moreover, this record discloses that Smith on or about November 1, 1876, (more than three years after the completion of the railroad,) went into possession of a portion of the land in dispute as a tenant of other parties, and that he was ousted therefrom by a final judgment in an action of ejectment at the suit of the railroad company on January 31, 1878.

Apart from the legal effect of that judgment as *res judicata*, it is thus quite apparent that Smith thereby was visited with notice of the claim of the railroad company.

But suppose it be conceded, for the sake of the argument, that the Lake Superior and Puget Sound Land Company made the first entry, and that the city of Bismarck and Smith as its grantee could avail themselves of such entry, still the proof is that the railroad company completed its road over the land before the town site was patented, and before Smith obtained his conveyance. To acquire the benefit tendered by the act of 1864 nothing more was necessary than for the road to be constructed. The railroad company by accepting the offer of the Government obtained a grant of the right of way, which was at least perfectly good as against the Government. And be it further conceded, but not decided, that the railroad company when it changed its route, after the filing of its map of definite location, lost its priority of right under the grant of the act of 1864 as against subsequent grantees of the United States who obtained title before the actual construction of the railroad, and that the railroad company could only legally proceed under the exercise of its right of eminent domain, it

still remains, as we think, under the facts of this case, that Smith could not maintain his present action seeking to oust the company from possession of its right of way and railroad constructed thereon.

There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.

Such were the facts in the case of *McAulay* v. *Western Vermont Railroad Company*, 33 Vermont, 311, and where Chief Justice Redfield delivered the opinion of the court, a portion of which we quote:

"It being admitted, as it seems to be, that the plaintiff had full knowledge of the proceedings of the company to locate and construct their road upon his land, before and during all the time of the construction, and that he did not interfere in any way to prevent the occupation of the land for the purposes of the road, otherwise than by forbidding the hands working on the road until his damages were paid, and that only on one occasion, it becomes an important inquiry whether he can maintain ejectment for the land by reason of the nonpayment of his damages. . . . It is undoubtedly true that, according to our general railroad statutes and the special charters in this State, the payment or deposit of the amount of the land damages, assessed or agreed, is a condition precedent to the vesting of the title, or of any right in the company to construct their road, and that if they proceed in such construction without this, they are trespassers, and this has been repeatedly so held by this court.

"This may have led to the misapprehension in the present case, but it certainly is a very serious misapprehension. In

these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire an important interest in its continuance. The party does not, of course, lose his claim or the right to enforce it in all proper modes. He may possibly have some rights analogous to the vendor's lien in England, and here until the legislature cut it off. But it is certain, according to the English decisions, that he cannot stop the work, and especially the trains upon the road, if he has, in any sense, for the shortest period, clearly given to the company, either by his express consent, or by his silence, to understand that he did not intend to object to their proceeding with their construction and operation. . . . If there was then a waiver in fact, either express or implied, by acquiescence in the proceedings of the company, to the extent of not insisting upon payment as a condition precedent, but consenting to let the damages be and remain a mere debt, with or without a lien upon the roadbed, as the law may turn out to be, then it is impossible to regard the defendants in any sense in the light of trespassers or liable in ejectment."

Justice v. *Nesquehoning Valley Railroad*, 87 Penn. St. 28, was a case where a railroad company was a trespasser, and its entry upon land not in conformity with law, and it was held that these irregular proceedings did not operate as a dedication to the landowners of the property of the company, placed upon the land, so as to entitle said landowners to include said property in an assessment of damages under the railroad law, and recover their value as an accession to the value of the land taken by the company. In delivering the opinion of the Supreme Court, Chief Justice Agnew said:

"This is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a

public use — materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *nolens volens*, but it is not so in this case; for though the original entry was a trespass, it is well settled, that the company can proceed, in due course of law, to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon."

In *Provolt* v. *Chicago, Rock Island & Pacific Railroad*, 57 Missouri, 256, it was held that the conduct of a landholder in standing by while a railroad company constructed its road, precluded him from recovering physical possession of the land covered thereby. Judge Wagner, after quoting with approval the language of Chief Justice Redfield in *McAulay* v. *Western Vermont Railway Co.*, hereinbefore cited, said:

"The plaintiff did not attempt to obstruct or in anywise impede the progress of the work. The plain inference was that he waived his right for prepayment of his damages and only intended to follow his remedy on his judgment. His conduct surely led the company to believe such was his purpose and induced them to pursue a course and expend large sums of money which, otherwise, they would not have done. If plaintiff intended to rely on his rights and make present payment a condition precedent, he should have objected and forbidden the company to interfere or to do any work on his land till the question of damage was settled. But this he did not do. He acquiesced in the proceedings of the company to the extent of not insisting upon the prepayment as a condi-

tion precedent; and after having done so, we do not think that he can maintain ejectment.

"If from negotiation in regard to the price of the land, or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the landowner, it would seem wholly at variance with the expectations of the parties and the reason of the case, that the landowner should retain the right to enter upon the land, or to maintain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages were paid from the earnings. (2 Redf. Am. Railw. Cas. 2d ed. 353.) But the only question we are called upon to decide is whether under the facts and circumstances of this case ejectment will lie, and we think it will not."

A similar question was decided in the case of *The Omaha and Northern Nebraska Railway* v. *Redick*, 16 Nebraska, 313. This was an action of ejectment for the possession of a forty-acre tract of land, brought by a landowner against a railroad company, which had constructed its road over said tract. It seems that the plaintiff, as one of the directors of the railroad company, had known that the company was constructing its road across its lands, and had remained quiet. The court said:

"It is true that under the constitution and laws of this State the assessment of damages and payment or deposit of the amount is a condition precedent to the vesting of the title or of any right of the company to construct their road. But these conditions are susceptible of being waived. . . . Whatever right the plaintiff may have against the railroad company, growing out of this right of way question, and whether he is estopped *in pais* to assert any and all of them, it seems clear that he is not entitled to a judgment that would enable him to sever a line of commerce which, by his assent if not through his active agency in part, was constructed over this same property, and has enjoyed free passage over it for at least seven years."

The same conclusion was reached in *Lexington & Ohio Railroad* v. *Ormsby*, 7 Dana, 276; *Harlow* v. *Marquette &c. Railroad*, 41 Michigan, 336; *Cairo and Fulton Railroad* v. *Turner*, 31 Arkansas, 494; *Pettibone* v. *Lacrosse and Milwaukee Railroad*, 14 Wisconsin, 443; *Chicago and Alton Railroad* v. *Goodwin*, 111 Illinois, 273; *Kanaga* v. *Railway Co.*, 76 Missouri, 207; *Dodd* v. *St. Louis & Hannibal Railway*, 108 Missouri, 581; *Evansville & Terre Haute Railroad* v. *Nye*, 113 Indiana, 223.

This subject was fully considered by this court in the case of *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, where, upon the foregoing authorities and others, it was *held* that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

Upon principle and authority we therefore conclude that neither the city of Bismarck, as owners of the town site, nor its grantee Smith, can, under the facts and circumstances shown in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending two hundred feet on each side of its said road. The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants. The precise character of the busi-

ness carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action.

These views dispose of the case, and render it unnecessary to determine whether the trial of the title of lots eleven and twelve, in the action between the railroad company and Smith, as a tenant of Browing & Wringrose, resulting in a final judgment, was well pleaded as *res judicata* in the present action.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to enter a judgment in favor of the defendants.

MR. JUSTICE GRAY and MR. JUSTICE WHITE concurred in the judgment of the court only on the ground first stated in the opinion of the court, that is, the sufficiency of the title of the railroad company.

MR. JUSTICE BREWER, concurring specially: I concur in a reversal of the judgments below but not in all the conclusions reached in the foregoing opinion, nor in the direction to enter judgment for the defendant. I think the estoppel relied on goes only to the ground actually occupied by the railroad company with its tracks, station houses and other buildings used exclusively for railroad purposes, and does not extend to the entire four hundred feet of the right of way which the company claims under the Congressional grant. It may be that a large portion of this tract is in only the constructive possession of the company, or it may be occupied by the buildings not used exclusively for railroad purposes, and as to all such ground I do not think any estoppel extends.

I am also of the opinion that the legal title conveyed by the town site patent and the deed to plaintiff must prevail in this action at law over any equities the company may have acquired by occupancy.

MR. JUSTICE HARLAN dissented.